UNIVERSITY OF NAIROBI

SCHOOL OF LAW

ENFORCEMENT OF DIRECTORS' DUTY TO PROMOTE SUCCESS OF A COMPANY:

A FOCUS ON THE BANKING SECTOR

A THESIS SUBMITTED TO THE UNIVERSITY OF NAIROBI SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTERS OF LAWS (LL.M)

BY

EUNICE WANGARI KAMAU

G62/86968/2016

SUPERVISOR

PROFESSOR EDWIN ABUYA

NOVEMBER 2019

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By

Eunice Wangari Kamau

G62/86968/2016

Supervisor

Professor Edwin Abuya

Date Presented

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DECLARATION

I, **EUNICE WANGARI KAMAU,** do hereby declare that this thesis is my original work and has not been submitted, and is not currently being submitted by any other university.

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EUNICE WANGARI KAMAU **DATE**

G62/86968/2016

This research paper has been submitted for examination which my approval as University Supervisor.

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PROF. EDWIN ABUYA **DATE**

ACKNOWLEDGEMENT

Several people have contributed towards this research. I am grateful to each one of them.

First, I give special thanks to my supervisor, Professor Edwin Abuya, whose insight and guidance steered me through this research. Special thanks to Regina Anyika, for her invaluable support and encouragement.

Secondly, I would like to thank all my respondents who agreed to participate in the interviews and took their time to have the discussions. Without them, I would not have much content for this thesis.

I would like to thank my family members for their support through the years of study. Their investment in my studies ensured that I could never give up.

DEDICATION

For my Mother, who has been there for me throughout this process and given me a lot of support.

ABSTRACT

There has recently been a wave of bank failures. This study attempts to analyze some of the reasons for the failures. Section 143 of the Kenyan Companies Act imposes on directors of companies, a "duty to promote the success of the company". The section further sets out a list of key deliverables and various stakeholder groups whose interests the directors should consider. This study looks into the possibility of enforcing that duty to ensure that banks succeed. To answer these questions, this study carried out both desktop and fieldwork research. From the desktop research, there is a lot of speculation as to whether the law currently, is capable of delivering success for all stakeholder groups. This speculation is further infused with the responses from the field research, resulting in some critical insights.

The results from this research indicate that the board of directors is critical in determining the success or failure of the company. Further, that companies that adopt best practices of corporate governance are more likely to succeed. The results also indicate that there are indeed challenges affecting the enforcement of the duty. These challenges arise from the ambiguity of the law and weaknesses in enforcement mechanisms.

This study therefore gives guidance to directors of banks on how best to ensure that banks succeed even if they are not involved in the day-to-day running of the institution. This is in spite the fact that there are inherent weaknesses in the law. It is imperative that bank directors appreciate that theirs is a unique role, as compared to directors in other industries. It is also important for bank directors to ensure that the banks they steer adhere to the best practices of corporate governance, despite the short-term pressures.

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PRELIMINARIES

List of Abbreviations and Acronyms

AML	Anti-Money Laundering
BCBS	Basel Committee on Banking Supervision
BR	Bank Run
CBK	Central Bank of Kenya
CBR	Central Bank Rate
CDSC	Central Depository and Settlement Corporation
CEO	Chief Executive Officer.
CG	Corporate Governance
CMA	Capital Markets Authority
IRA	Insurance Regulatory Authority
KDIC	Kenya Deposit Insurance Corporation
NSE	Nairobi Securities Exchange
OECD	The Organisation for Economic Co-operation and Development
PGs	Prudential Guidelines
RBA	Retirement Benefits Authority
UK	United Kingdom

USA	United States of America
ESV	Enlightened Shareholder Value
NACOSTI	National Commission for Science, Technology and Innovation
FATF	Financial Action Task Force (on Money Laundering)

Statutes and Regulations

1. Banking Act, Cap 488.
2. Capital Markets Act.
3. CBK Prudential Guidelines.
4. Central Bank of Kenya Act, Cap 491.
5. Central Depositories Act, 2000.
6. Companies Act, 2015.
7. Constitution of Kenya
8. Insurance Act, Cap 487.
9. Kenya Deposit Insurance Act No. 12 of 2012.

Statutes from Other Countries

1. United Kingdom Companies Act 2006

Cases

Kenyan Cases

1. *Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) & Praful Shah* [2016] eKLR
2. *Ghelani Metals Limited & 3 Others v Elesh Ghelani Natwarlal & Another* [2017] Eklr
3. *JSK (Cargo) Ltd v Kenya Airways Ltd* [2008] eKLR
4. *Kimani Waweru & 4 others v Central Bank of Kenya & 7 others* [2018] Eklr
5. *Udali Group Limted v Umberto Riccardo Dellavale & 3 others* [2017] eKLR

Cases from the UK

1. *Aberdeen Railway Co v Blaikie Brothers* 1854 UKHL 1
2. *Charter bridge Corp Ltd v Lloyds Bank Ltd [1970] Ch 62; [1969] 3 All ER 1185.*
3. *Foss v Harbottle (1843) 2 Hare 461.*
4. *Lennard's Carrying Company v Asiatic Petroleum Company Limited (1915) AC 705*
5. *Re City Equitable Fire Insurance Company Ltd [1925] Ch 407*
6. *Re Smith & Fawcett Ltd [1942] Ch. 304.*
7. *Regentcrest plc v Cohen [2001] BCC 494 (Ch)*
8. *Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244; [2005] 2 BCLC 91 at [52].*
9. *Salomon v Salomon & Company Limited [1897] AC 22.*

Definition of Terms

The Act	the Companies Act of Kenya
The duty	the duty to promote the success of the company
The board	the Board of Directors
Section 143	section 143 of the Companies Act, Laws of Kenya

‘There seems to be a light at the end of the tunnel’[1]

CHAPTER ONE: INTRODUCTION

1.1 Introduction to bank failures

A number of banks have recently collapsed.[2] These include Dubai Bank, which was placed under liquidation in August 2015, Imperial Bank, which was placed under receivership in October 2015, and Chase Bank, which was also placed under receivership in April 2016.[3] However, this is not a new phenomenon in Kenya. In 1984, following the relaxation of the rules governing issuance of licenses to banks, the Rural Urban Credit Finance ended up under interim liquidation. During this first wave of bank failures, the Continental and Union Bank Groups were also affected.[4] This spurred the review of the Central Bank of Kenya Act and the Banking Act to raise capital requirements and create the Depositors Protection Fund.[5] The aim of the amendments was to create more stability in the banking industry.

The collapse of banks is mainly attributable to the banks’ management quality and oversight by the board of directors.[6] Weak regulatory structures governing directors’ duties

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[1] Interview with Taji, Nairobi, Kenya 29 January 2019.

[2] Robert Gathaiya, ’Analysis of Issues Affecting Collapsed Banks in Kenya from Year 2015 to 2016, (2017) 7 IJMBS 9,11.

[3] Central Bank of Kenya, ‘The Kenya Financial Sector Stability Report 2016’, Published by the Financial Sector Regulators Forum, September 2017, 2.

[4] Martin Brownbridge, Charles Harvey and Augustine Fritz Gockel, *Banking in Africa: The Impact of Financial Sector Reform Since Independence*, (James Currey Publishers, 1998) 94-95.

[5] Depositors Protection Fund is Now Kenya Deposit Insurance Corporation (KDIC) following the enactment of the Kenya Deposit Insurance Act of 2012, Laws of Kenya.

[6] Ogilo Fredrick, Omwoyo Jeremiah, Zipporah Onsomu, ‘The Relationship between Liquidity Risk and Failure of Commercial Banks in Kenya’ (2018) Universal Journal of Accounting and Finance 6(1): 7, 8.

and weak enforcement mechanisms are also major contributing factors.[7] Imperial Bank, Dubai Bank and Chase Bank underwent performance crisis due to unsound business practices, which could be traced to the directors.[8] For instance, one of the main causes of failure in Chase Bank was under reporting, which is the duty of directors.[9]

The financial crisis has not only been local. There have been major corporate failures that have shaken major financial institutions globally.[10] Corporate governance in banks is essential to the national and international financial system and is necessary to guarantee a sound financial system for economic development.[11] However, the recent bank failures and financial crises have raised questions on the effectiveness of governance practices of the banking sector. It is interesting to note that corporate governance literature has paid very little attention to issues of banking governance, especially in developing countries.[12] This is despite the dominant position that banks have in the financial systems of such countries.[13]

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[7] Gathaiya (n2) 11.

8 See Kimani Waweru & 4 others v Central Bank of Kenya & 7 others [2018] Eklr where it was observed that various Banks including Imperial Bank, Dubai Bank Limited, National Bank Limited, Chase Bank Limited, have been affected by various Governance issues. These issues attracted the attention of the regulator and the Depositors in the said Banks were thereby adversely affected, or stood to be adversely affected.

[9] Ibid, 10.

[10] Mahmood Imam and Mahfuja Malik, 'Firm performance and Corporate Governance through Ownership Structure: Evidence from Bangladesh Stock Market' (2007) International Review of Business Research Papers 3 (4), 88, 91.

[11] Basel Committee on Banking Supervision, 'Enhancing Corporate Governance for Banking Organisation' 2006. Basel, Switzerland.: Bank for International Settlement.

[12] Dan Lupu & Andra Nichitean, 'Corporate Governance and Bank Performance in Romanian Banking System' (2011) 11 1 (13), Fascicle of the Faculty of Economics and Public Administration 219, 225.

[13] Macey J. R. & O"Hara M., 'The Corporate Governance of Banks.' (2003) Economic Policy Review, 9:1, 91, 107.

Particularly in Kenya, the capital market is still not very dominant[14] and, hence, banks control the financial sector.[15]

Directors have a core role in corporate governance since they are agents of the shareholders, who are the principals.[16] Therefore, as agents, directors' duty is to that that they act in the best interest of the principal.[17] However, in a number of times the directors fail to act in the best interest of the principal and instead act in their own interest.[18] Particularly, bank directors have a fiduciary responsibility and legal obligation to ensure that depositors' funds are safe, instill confidence and contribute to the growth of the banking industry and stability of the economy.[19]

In enforcing the duties of the director, there is need to ensure that directors who breach their duties are culpable.[20] This can be done by imposing liability, both civil and criminal, on directors who breach their duties.[21] Responsible directors need not wait for the law or

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[14] Rose Ngugi, Daniel Amanja and Isaya Maana, Capital Market, Financial Deepening And Economic Growth In Kenya, Available at <http://41.89.55.71:8080/xmlui/bitstream/handle/123456789/2669/Ngugi_Capital%20market,%20financial%20deepening%20and%20economic%20growth%20in%20Kenya.pdf?sequence=1&isAllowed=y> Accessed on 8 August 2018.

[15] Ibid.

[16] Michael Jensen and William Meckling, 'Theory of the Firm, Managerial Behavior, Agency Cost and Ownership Structure' 3(1976)4 Journal of Financial Economics 309,309.

[17] Ibid, 310.

[18] Ibid, 330..

[19] Ross Levine, 'The Corporate Governance of Banks: A Concise Discussion of Concepts and Evidence' (2003) 18 National Bureau of Economics Research, Global Corporate Governance Forum 1, 1.

[20] Lupu & Nichitean (n12) 220.

[21] Ibid, 221.

the regulators to reign in on them. They should be in the frontline exercising oversight over the management of the banking institutions. [22]

This study focuses on the banking sector because banks play a major role in the economic development of the country.[23] The concern of this study is that banks are very opaque in their operations,[24] undermining the agency theory. The Central Bank of Kenya (CBK) plays a major role regulating the supply of money in the economy by monitoring banking business.[25] In this quest to monitor banks, the Banking Act provides that the CBK is responsible for good corporate governance in banks. The CBK discharges this responsibility through issuing of directives on the duties of directors, which is the heart of this study.[26]

1.2 Statement of the Problem

During the 1990s, there was a movement towards financial liberalization, which led to opening up of the banking industry.[27] As a result, there was an influx of banks in the country leading to increased competition and, consequently, flaunting of corporate governance practices. Immediately thereafter bank failures began to be experienced leading to issuance of Prudential Guidelines by the CBK.[28] However, given the recent cases of

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[22] Ibid, 225.

[23] Ibid, 225.

[24] Levine (n19) 2.

[25] Central Bank Act, Laws of Kenya Chapter 491 Section 6.

[26] Banking Act, Laws of Kenya Chapter 488.

[27] Jeremy Mutwiri Kirimi, 'The Relationship Between Bank Corporate Governance and Performance of Kenyan Banks,' unpublished thesis for the Degree of Master of Arts in Economics, University of Nairobi, School of Economics, 5.

[28] Ibid, 6.

Imperial bank, Dubai bank and Chase Bank, the problem seems to persist. The Companies Act has now codified the duty to promote the success of a company.[29] The problem that this study seeks to address is the underlying reasons for bank failures despite the regulations. Are these mechanisms adequate in the banking industry to ensure directors promote success of a bank?

1.3 Justification of the Study

Corporate governance has a significant implication in a county's economy.[30] Good corporate governance practices are considered important in reducing risks for investors, which ultimately attracts investment capital.[31] The resulting investor confidence creates a good impact on the economy.[32] Corporate governance is therefore, an issue of great importance for all business entities especially banks, given their vital role in the economy. The implications of the recent bank failures have been massive and had far-reaching effects. This is why there is a need for keen focus on issues of corporate governance, with particular focus on the board of directors. These individuals are primarily tasked with the oversight role of these institutions.

The laws on corporate governance in Kenya were deemed by the legislature as inadequate in dealing with the current challenges. There was a need to rectify this inadequacy by way

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[29] Companies Act, Laws of Kenya, Section 143.

[30] Gopal P, "A critical examination of the Impact of Section 172 of the Companies Act 2006," 1(4) The Student Journal of Law, 2012, 4, 6.

[31] Kumudini Heenetigala, 'Corporate governance practices and firm performance of listed companies in Sri Lanka' Unpublished Thesis for the degree of Doctor of Business Administration, Victoria Graduate School, Faculty of Business and Law, Victoria University, Melbourne, April 2011, 2.

[32] Ibid.

of codifying directors' fiduciary duties.[33] The president assented to the Companies Act on 11 September 2015. It proposed to improve doing business in Kenya and attracting investors. One of its aims was to resolve the existing gaps in corporate governance and to develop a legal framework in line with the present corporate governance challenges. This study therefore aims at investigating whether the duties as codified and in particular the duty "to promote the success of the company" have rectified the inadequacy that existed.

The results of this study will provide indicators on the corporate governance weaknesses that would be useful for banks, directors, regulators and stakeholders at large.

1.4 Statement of Objectives

The main objective of the study is to establish enforcement of director's duty to promote the success of a bank through providing for adequate legislation and enforcement mechanisms in the banking sector.

The study will focus on the following key objectives:

1. The nexus between good corporate governance and directors' duty to promote the success of a bank.
2. Enforcement of directors' duty to promote the success of a bank.

1.5 Literature Review

Several authors have studied the duty to promote the success of a company in line with corporate governance principles. There is also literature specifically focusing on banks and

[33] Mercy Kinyua, 'A Case for the Statutory Codification of Directors' Duties in Enhancing Good corporate governance in Kenya: A case study of the National Bank of Kenya' Unpublished Thesis for the Degree of Master Of Laws (LL.M) of The University Of Nairobi. November 2014, 1.

even further on banks in Kenya. Based on the studies of these authors, this study identifies glaring gaps, which form the basis of this study.

1.5.1 Introduction

Good corporate governance aims at facilitating effective, entrepreneurial and prudent management with a focus on the long-term success of the company.[34] It therefore dictates that the board of directors governs the corporation to attain these objectives of maximizing long-term value for the shareholders. Further, good corporate governance demands that the company consider the best interest of environment and other stakeholders.[35] With this good corporate governance requirements in mind, the Companies Act included and codifying the duty to promote the success of the company.[36]

This subsection outlines a review of literature focusing on three critical aspects of this study; the critical role of the board of directors, how a director's breach fueled by a lacking regulatory framework affects the banking institution and the need for enforcement of directors' duty to promote success of the bank.

1.5.2 The Importance of Banks and the Critical Duty of its Board of Directors

Financial services, which are dominated by banks, assume a critical role in the proficient distribution of production resources. As such, banks vastly contribute to trade, investment

[34] Financial Reporting Council, UK Corporate Governance Code (Financial Reporting Council Limited, 2010) 1. 145 Article 80 of Table A.

[35] Ibid.

[36] Companies Act (n29).

and economic growth at large.[37] According to Amanja, the financial sector is one of the six key drivers of high growth recognized in Kenya's Vision 2030. The other sectors are: tourism, agriculture, manufacturing, wholesale and retail trade and business process outsourcing.[38] He points out that CBK'S mandate of safeguarding financial system stability is a vital part of preserving monetary and macroeconomic stability in an economy.[39] It is therefore important that banks operate under tight regulatory conditions. However, Amanja does not explain how tight the conditions should be. This leaves the degree of regulation open to determination by the regulator. If not well defined the regulator may go overboard. That is why this study will look into the importance of banking regulation and how the same can be enforced while ensuring the success of the bank.

Indeed, Oduor et al note that the banking sector has witnessed an increase in the regulatory requirements following the international financial crisis that occurred in 2007-2009.[40] In addition to the regulatory requirements, Alberto Heimler notes that in times of financial crisis particularly, financial institutions are often subject to microeconomic concerns.[41] These concerns often emanate from their depositors over the institutions ability to manage

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[37] Daniel Mwirigi Amanja, 'Financial Inclusion, Regulation and Stability: Kenyan Experience and Perspective' presented during the UNCTAD's Multi-Year Expert Meeting on Trade, Services and Development held in Geneva, Switzerland May 11-13, 2015.

[38] Ibid.

[39] Ibid.

[40] Jacob Oduor, Kethi Ngoka & Maureen Odongo, 'Capital requirement, bank competition and stability in Africa' (2017) Review of Development Finance, 7(1), 45, 51.

[41] Alberto Heimler, 'Competition Policy, Antitrust Enforcement and Banking: Some Recent Developments' presented during session II at the fourth meeting of the Latin American competition forum, San Salvador, 11th And 12th July 2006.

risks.[42] These companies operating within the financial sector, therefore, often find themselves being the subject of more regulation than those operating in other sectors.[43] Mathenge agrees that there is indeed a need to regulate the banking industry considering that consumers of financial services are not well equipped to comprehensively assess the safety and soundness of financial institutions. That it is vital for the financial sector to enact prudential regulation and supervision of firms.[44] As much as this study recognizes the importance of regulation, it notes that the link between over regulation and success may not be clear cut. These authors do not seem to have any evidence to support the correlation between the enhanced regulation and success of the institution. This study will therefore look into causes of bank failures to determine whether regulation is one of them.

Momanyi points out that the balance between economic growth and financial stability through the extra regulation of banks is rather delicate.[45] On one hand, economic growth may be stifled in the instance where attention is fully placed on stability, and, on the other hand, exclusive focus on economic growth can be a recipe for future financial crises.[46] She concludes that financial stability may be more critical than the economic growth. Her conclusion is premised the fact that since financial systems stand on unstable ground, they

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[42] Ibid.

[43] Deloitte & Touche, ‘Duties of Directors’ April, 2013 Creative Services at Deloitte, Johannesburg, 15.

[44] Waweru Mathenge, Financial Regulatory Structure Reform in Kenya: The Perception of Financial Intermediaries in Kenya Regarding The Case For A Single Financial Regulator, University of Nairobi, School of Business, (2007) <Retrieved from http://www.erepository.uonbi.ac.ke> Accessed on 28th February, 2019

[45] Deborah Kemunto Momanyi, ‘Influence of Financial Regulation in Kenya on Financial Inclusion: A Case Study of the Banking Industry in Kenya’ August 2018, Working Paper Series Centre for Research on Financial Markets and Policy, 3.

[46] Ibid,4.

need to be well regulated in order to avert financial crises.[47] The literature reviewed look at the aspect of regulation from a regulators point of view but do not consider self-regulation. According to Oigara, in support of self-regulation in the banking industry, the market forces should inform self-regulation.[48] He states that the market is the most effective and rational mechanism for resource allocation, monitoring banks and disciplining banks if they fail to meet its expectations or engage in inappropriate conduct.[49] He certainly acknowledges that the banking sector is still one of the most scrutinized anywhere in the world, and Kenya is no different. He acknowledges that regulation of banks is indeed important and necessary since banks hold public money in trust.[50]

This study opines that regulation is important but too much of it may actually stifle the business of the bank. It will investigate further into the reasons why banks deserve more scrutiny and why the success of banks in any economy is imperative. Finally, it will clarify on the need to balance regulation and promoting success of the bank.

While regulating the banking sector, it is not enough to have stringent laws. The board of directors plays a critical role in directing the bank towards either success or failure. This study recognizes that a director of a bank carries a heavy burden with regards to the performance of his duties. In fact, Ira Newman recognizes that a director in a Bank carries a huge task compared to directors of other companies.[51] Christopher Wilson who analyzes

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[47] Ibid, 4.

[48] Joshua Oigara, 'Self-Regulation: A New Dawn for The Kenyan Banking Sector' June 2016 <https://blog.kcbgroup.com/self-regulation-a-new-dawn-for-the-kenyan-banking-sector/> accessed 9th October 2019.

[49] Ibid.

[50] Ibid.

[51] Irish Newman, 'Reducing the Risk of Bank Director Liability' (2009) 96 Banking Law Journal 418, 419.

the uniqueness that comes with being a director of a Bank supports this view.[52] He states that banks are quasi-public, hence, ought to be subjected to a higher threshold of accountability. Hilmer observed that the board of directors plays a critical role in ensuring that the entity remains above average in satisfying stakeholders' needs and aspirations.[53] While deliberating the fundamentals of corporate governance, Hilmer narrowed in on the board of directors as a vital tool in safeguarding corporate governance.[54] These assertions are echoed by Anand who points out that corporate governance involves various actors key of which is the board of directors.[55] The board of directors, thus, remains the main driver of corporate governance in organizations, which supports this study. However, these authors seem to place the entire burden of governance on directors, yet directors do not work alone. Directors are also not involved in the day-to-day running of the bank. As such there is need to put in place measures to ensure that directors still exercise their oversight role, effectively. This study will therefore look into the role of directors in ensuring the success the success of the bank through strategy, policies and processes.

According to Tandelilin et al., when managers and owners of banks show efforts and intention to implement good corporate governance practices, the bank is likely to experience an increase in market credibility and subsequently collect funds at lower cost

[52] Christopher Wilson, 'Responsibility of a Bank Director' (1955) 72 Banking Law Journal 55, 57.

[53] Fred Hilmer, *Strictly boardroom: Improving Governance to enhance company performance* (2nd Edn, Melbourne : Information Australia, in association with The Sydney Institute, 1998) 32.

[54] Ibid, 35.

[55] Sanjay Anand, *Essentials of corporate governance* (Hoboken, NJ: Wiley, 2007) 25.

and risk.[56] Better corporate governance leads to high performance of banks. It therefore follows that the opposite is true. Tandelilin's argument may be too narrow by reducing directors' duties to promote the success of a bank to a mere display of effort. The success of a bank takes more than mere effort. This study recognizes the criticality of a bank director's role. It will therefore investigate and outline the specific deliverables that constitute the director's duty to ensure success of a Bank.

This study recognizes that banks still fail despite regulation and having a properly constituted board of directors. Most studies focus on one aspect of banking business; deposit taking.[57] According to Nolt the aspect of giving loans is more important as it facilitates financial transactions albeit at a fee.[58] It is worth noting that many banks whose main business is offering loans do not principally rely on deposits as their source of funds.[59] They therefore must strike a balance between the loans offering business, which is long-term, and bank's source of funds, which are customer deposits.[60] Maintaining this delicate balance can be a challenge. This is because deposits by the public can be called up at any time.[61] For the bank to remain solvent, it must be able to honor the calls for funds by its depositors whenever they wish to withdraw them.[62] The banking business is often subject

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[56] Eduardos Tandelilin, H. Kaaro, Putu Mahadwartha, & Supriyatna, 'Corporate governance, risk management and bank performance: Does Type of Ownership matter?', (2007) 34 EADN Working Paper 52, 52.

[57] James Nolt, 'Why Banks Fail,' 2016 < https://worldpolicy.org/2016/04/21/why-banks-fail/> accessed on 8 August 2019.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid.

to suspicion by depositors and other creditors. The suspicion is usually triggered by any fall in asset value often resulting in a solvency crisis.[63] Nolt has a narrow approach to defining success. Maintaining solvency is not the only measure of success in a bank, especially in light of the Companies Act. Various other measures need to be considered too as discussed under the theoretical framework of this study, particularly, under the Enlightened Shareholder Value Theory (ESV).

1.5.3 The Duty to Promote Success of a Bank

Kosgei appreciates that of all the duties, the "duty to promote the success of the company" is definitely the most extensive and undoubtedly the most challenging to construe.[64] It is from this point of departure and the assumption that the duty was designed to greatly improve corporate governance in Kenya that she seeks to consider the duty and the degree to which it will achieve the purpose for which it was intended by the legislature.[65] She proposes that in an effort to resolve the aforementioned challenge and to understand the duty better, one should not read the duty in isolation but in context with the other duties set out in the Act.[66] Kosgei only considers the duty and its interpretation. She does not look at the aspect of enforcement. This study will therefore seal this gap by looking at the enforcement mechanisms of the duty. Further, whether these mechanisms are effective to ensure the duty achieves the intended purpose.

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[63] Ibid.

[64] Brenda Kosgei , 'Assessing whether codification of directors' fiduciary duties will facilitate at least partly improved corporate governance in Kenya: A critical analysis of the duty to promote the success of the company,' unpublished thesis for the Bachelor of Laws Degree, Strathmore University Law School, 7.

[65] Ibid, 17.

[66] Ibid, 10.

Alan Palmiter makes a broad analysis of director's fiduciary duties. He analyses the common law duties particularly the duty of loyalty and the duty to exercise independent judgment towards the success of an organization.[67] He states that the common law duties are core to the decision making of any organization and should be codified, with corporate governance being the guide that management relies on the fulfillment of these core duties.[68] Palmiter discusses the duties vaguely without shedding much light to the specific elements that make up the duties. In order to discuss the duty to promote the success of the bank comprehensively, it is critical that these elements are extensively discussed. This clarity is critical in enforcing the duty. This study discusses the elements of enforcement in chapter three, giving the much-needed clarity on the specifics enforcement.

While discharging the duty to promote the success of a bank, the directors should have regard to a list of factors.[69] Keay points out that these factors do not introduce any new duties, as the existing case law previously covered this.[70] Nevertheless, directors should now consider the long-term consequences of their decisions and the interests of other stakeholders beside shareholders. It appears that now the survival of the corporation is more important compared to the investment of the shareholders. Directors are therefore under an obligation to promote the corporation towards sustainability.[71] Shareholders may

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[67] Alan Palmiter,' Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence,' (1989) Texas Law Review 67(7) , 1351, 1353.

[68]Ibid.

[69] Andrew Keay, 'The Duty to promote the Success of a Company: Is it fit for purpose?' (2011) University of Leeds School of Law, Centre for Business Law and Practice Working Paper 4 17, 17.

[70] Ibid, 18.

[71] Ibid, 20.

purchase and sell shares as they wish.[72] As such, it could be argued that a company should concern itself with the future shareholders. Failure to care for such future shareholders will result in a gradual decline in interested shareholders and the company will eventually die. In other words, companies that are not preserved for the future, will not have one.[73] From this literature, it is still unclear how the long-termism is to be implemented by the directors. This study opines that it would be advisable for directors to identify the stakeholders and issues that are important to the company's long-term success. The directors should then engage with those stakeholders directly and interrogate all the relevant issues. However, this study cautions that directors should be careful while determining whether, and what, information they may require from the stakeholders, how extensively they need to engage with the stakeholders and the best way to do so. If they are not cautious, the directors may lose sight of the main goals of the company. The legislator has also left to the directors the subjective decision on what long-termism means in specific situations.[74] The definition of long-termism is therefore an area that needs to be explored and this study will attempt to define it.

Directors required, in the best interest of the company as a whole, to act in good faith.[75] In essence, the law is cognizant of the directors' position of trust, and the requirement for good faith on the part of directors, as well as avoiding personal gains while carrying out

[72] Ibid, 18.

[73] Ibid, 20.

[74] Katarzyna Chalaczkiewicz-Ladna, 'Examples of long-term and short-term decision-making in the UK, Delaware and Germany, gap-filling exercise in the context of the shareholder v. stakeholder debate and share ownership structure of the company (2018) European Business Law Review 29(2), pp. 237, 240.

[75] Keay (n69), 18.

the duties.[76] How the directors address the interests of shareholders and stakeholders is a matter for them, but they should make this assessment in good faith.[77] All the same, the duty does not burden a director to do more than good faith. A director who makes a decision in good faith will most likely not be held liable should there be a failure of the company due to a factor that would not have influenced his decision in the first place.[78] The term good faith is subjective and there is still no clear guidance in what the term entails. This study will also make its contribution towards definition of the term good faith.

This study also seeks to establish whether there is any link between corporate governance and the success of a bank. Some authors are of the view that good corporate governance does not directly result in the success of a bank.[79] Heracleous carried put research on the subject and concluded, "Researches have failed to find any convincing connection between the best practices in corporate governance and organizational performance".[80] This study disagrees with this argument. On the contrary, the success of any bank is informed by good corporate governance practices. This study will therefore seek to establish the connection between best practices of corporate governance and organizational performance.

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[76] DC100, 'Guidance On Directors' Duties: Section 172 And Stakeholder Considerations' (2018) < https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 16 May 2019.

[77] Caroline Lavis, 's172 Director's Duty – it's not just about the bottom line' 2019 <https://www.michelmores.com/news-views/news/s172-directors-duty-%E2%80%93-its-not-just-about-bottom-line> accessed on 9 October 2019.

[78] Ibid.

[79] David Larcker, Scott Richardson & Irem Tuna, 'Corporate Governance, Accounting Outcomes, and Organizational Performance,' (2007) The Accounting Review, 82(4), 963,1008.

[80] Loizos Heracleous, 'What is the Impact of Corporate Governance on Organisational performance?' (2008) Corporate Governance: An International Review, 9(3), 165, 170.

The link between corporate governance and performance of banks may not be so clear-cut for now. However, there is a growing belief that the board of directors, being legally the highest authority in the company, plays a significant role on the performance of the company.[81] Breach of its duties thereof has far-reaching consequences.[82] Most of the literature reviewed by this study is biased towards the abilities of the board to perform its duties, but there is little literature on the importance placed on the outcome of the performance of those duties, whether failure or success.[83] As Nicholson and Kiel discuss, the failure of some companies, therefore, comes as a surprise as there is no clear implementation of the board's role in line with the company's strategy.[84]

Eric Ernest Mang'unyi attributes poor governance of banks to weak regulatory structures, which results to their collapse.[85] This sentiment is echoed by Hamilton and Micklethwait who observed that, among the causes of corporate failure is an ineffective board of directors who take advantage of the weak regulatory structures.[86] However, these authors do not provide insight into banks that have succeeded yet they operate in the same environment and with the weak regulatory structures. It is therefore critical for this study to discuss the role of directors in the enforcement of the duty to promote success of a bank.

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[81] Ada Demb and Fred Neubauer, '*The Corporate Board: Confronting the Paradoxes'*, (Oxford University Press, New York, 1992) 10.

[82] Ibid, 12.

[83] Gavin Nicholson and Goeffrey Kiel, 'A framework for diagnosing board effectiveness', (2004) 12(4) Corporate Governance 442,450.

[84]Ibid, 443.

[85]Eric Ernest Mang'unyi, 'Ownership Structure and Corporate Governance and Its Effects on Performance: A Case of Selected Banks in Kenya International' (2011) 2(3) Journal of Business Administration 2, 5.

[86] Stewart Hamilton & Alicia Micklethwait 'Greed and corporate failure; Lessons from recent disasters', (Pelgrave Macmillan, New York, 2006) 5.

Clarke[87] notes that boards dominated by executive members often lack in capacity to offer objective leadership while non-executive directors often do not have sufficient information to effectively run the company. They have no idea what is expected of them as the champions of governance. Charan actually observed that most of the directors do not add any meaningful value to the strategy of the company since they hardly allocate sufficient time to their duties. Despite being the drivers of the corporate strategy, the directors are often clueless on what the strategy entails.[88] It is with this observation in mind that this research will to look more closely at the internal corporate governance structures within banks, with the aim of making proposals on better value add by the bank directors.

In a case study of the Northern Rock[89] Roman Tomasic pointed out that the chairman and Chief Executive Officer (CEO), lacked adequate banking qualifications leading to the collapse of the bank.[90] The failure of Northern Rock, one of the biggest banks in the UK, was both a failure of the regulator as well as a failure in proper governance of the Northern Rock board of directors.[91] Roman Tomasic further points out that UK laws were ill equipped to effectively deal with bank failures. This failure led to a rush to come up with new corporate governance regimes in a struggle to rescue failing banks in order to maintain economic stability. Tomasic makes a unique observation that bank failure can also arise

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[87] Thomas Clarke, *Theories of corporate Governance* (Routledge: New York 2004) 53.

[88] Ram Charan, *Boards that deliver: Advancing corporate governance from compliance to competitive advantage.* (Jossey- Bass, Sanfrancisco 2005) 23

[89] Northern Rock, was a British bank that had to be nationalized due to financial problems.

[90] Roman Tomasic, *The Failure of Corporate Governance and the Limits of Law: British Banks and The Global Financial Crisis.' Corporate Governance and the Global Financial Crisis: International Perspectives.* (Cambridge: Cambridge University Press, 2011), 56.

[91] Brian Walters, *The Fall of Northern Rock: An Insider's Story of Britain's Biggest Banking Disaster* (Petersfield, Hampshire: Harriman House 2008) 62.

from failure on the part regulator. This points to a gap in the law on enforcement, which this study will investigate under chapter 2 while discussing causes of bank failures.

Mwaura observes that the courts assessment of a directors' liability is subjective, as existing statutes do not provide for any requirements on expertise or experience in the management of companies.[92] Therefore, a director without the required degree of skill and experience will easily get off the hook. He also observes that directors who have been responsible for the insolvency of several companies in Kenya are not barred from acting as directors unless disqualified following bankruptcy of conviction for fraud.[93] Even though these studies effectively link directors' qualifications with the performance of the company, the authors fail to explore how best the requirement on qualifications can be enforced. This study will seek to establish whether the composition of the board of directors has any bearing on the success of a bank. It will further discuss ways in which a bank's board can be constituted for success.

1.5.4 Enforcing Director's Duty to Promote Success of the Bank

Riley in analyzing the legal framework with regards to duties of a director states that the law has been lenient on directors who do not promote the success of a company.[94] He argues for the development of this duty and the duty of loyalty.[95] He states that such duties should be linked to the functions of a director in order to ensure that they are effectively

[92] Kiarie Mwaura, 'Disqualification of Directors in Kenya' (2003) 54 Northern Ireland Legal Quarterly, 118, 120.

[93] Ibid.

[94] Ibid.

[95] Christopher Riley, 'The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard,' (1999) 62 Modern Law Review 697, 699.

upheld. Riley gives an insightful manner of entrenching the duty into the director's job description. [96] However, the author but does not provide any insight on how the performance of a director can thereafter be reviewed to be weighed against the success or failure of the company. Enforcing the duties of a director is core in establishing corporate governance and this study will explore and recommend ways in which the performance of individual directors can be reviewed.

Angelini in her analysis of directors' liability states that shareholders entrust directors to exercise oversight over the affairs of the company. She identifies the core duties, being, the duty to exercise skill and care, duty of obedience and duty of loyalty. She argues that in order to enforce director's duties and promote good governance, hence the success of the company, the legal framework should provide adequate measures on director's liability.[97] Angelini does not give any proposals on how the legal framework should be improved to enforce directors' liability. This study looks into the strides made towards that end in Kenya and the improvements required.

Mwaura observes that a shareholder of a company whose directors form and control the majority shares of the company are likely to have a hard time enforcing directors' liability for irresponsible behavior.[98] He further observes various shortcomings in the regulatory framework that give room for breach of directors' duties. He points out that directors may choose to disregard their duties since their duties are owed to the company and only the

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[96] Riley (n95).

[97] Anita Angelini, 'Bringing Directors Liability Home' Feature Report on Governance (2008) January/February LawNow 32, 32.

[98] Kiarie Mwaura, 'Regulation of Directors in Kenya: An Empirical Study' (2002) 13 (12) International Company and Commercial Law Review 465.

company has *locus standi*.[99] According to John Skiles, development of a legal framework to address director's liability is core. [100] Skiles makes his analysis during a period when there was a wholesale failure of the banking sector. He makes scrutiny of the banking sector where bad loans are issued due to directors, failing and neglecting the performance of their oversight duties.[101] In his analysis this goes against the common law duties of care and therefore argues that directors ought to be held liable for being negligent in the roles.[102] One issue that he discusses passionately is how a director's liability can be raised when instituting an action in law. Being a duty owed to the company, other stakeholders can hardly enforce it. This includes the shareholders and the stakeholders such as the creditors. Skiles raises a very important enforcement challenge. With the enactment of the Companies Act, even minority shareholders are eligible to institute action on behalf of the company. However, there exists various hurdles that most shareholders are not willing to surmount as discussed in chapter 3 of this study. This study therefore makes recommendations on enforcement is stakeholder interests through enhancement of minority shareholders rights.

Andrew Keay, analyzes the duty imposed on directors to promote the success of the company.[103] He focuses on section 172 of the United Kingdom Companies Act 2006.[104] This section is a replica of section 143 of the Kenyan Companies Act. Keay attempts to

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[99] Ibid.

[100] John Skiles, 'Individual Personal Liability of Bank Directors for Negligent and Excess Loans' (1932) 7 Notre Dame Law 185, 187.

[101] Ibid, 187.

[102] Ibid, 188.

[103] Keay (n69) 18.

[104] Ibid, 19.

assess whether the duty provided under section 172 is fit for purpose. He submits that the duty does not fulfill the purpose for which it was envisioned.[105] He further cautions the U.K against having strong hopes that section 172 is likely to resolve any of the corporate governance challenges that were exposed during the financial crisis of 2007-2008 in the U. K.[106] He explains that most prominent reason for the financial crisis seems to be poor corporate governance practices in the financial institutions.[107] He expounds that accountability of directors duties set out in the law is central to corporate governance. With the above caution by Keay, given the law as transplanted from the UK, this study will investigate whether Kenya should take a lesson from the UK. Further, the law was transplanted from the UK yet the Kenyan environment may be different. This paper will investigate the chances of the law as transplanted from the UK making any impact in Kenya.

Emily while looking at the United States of America corporate structure calls for increase in accountability and transparency in the executive. She states that this can be done through improving corporate government measures at the banks.[108] There is therefore a huge gap in terms of enforcement of Section 143 of the Companies Act and there is no clear mechanisms provided for holding directors accountable in the event that companies fail. This study will contribute to ways in which the law can be amended to promote success of a company clearly setting out the enforcement mechanisms.

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[105] Ibid, 19.

[106] Ibid, 17.

[107] Ibid, 17.

[108] Emily May, 'Bank Directors Beware: Post Crisis Bank Director Liability' (2015) 19 North Carolina Banking Institute 31, 31.

Nowicki makes an analysis on the aspect of the duty of good faith. She discusses how directors have managed to escape liability for breach of their duties. She states that enforcement of the duty is hard as it was not clear in law what the phrase meant. She states that due to a clear definition of the duties of a director, then addressing the issue of director's liability becomes a challenge. She supports deeper definition of the word 'good faith'.[109] The Kenyan Companies Act provides that a director shall act in a way that he considers, in good faith, would promote the success of the company.[110] It therefore poses a major challenge to anyone intending to question the actions of a director, especially one who is able to explain in a satisfactory manner, that he or she honestly believed that the decision was in the company's best interest.[111] There is therefore a glaring gap, as the term good faith is not defined. Kosgei also points out that the words 'good faith' and 'success' are quite dicey, and may thus be interpreted differently by different directors creating confusion.[112] Kiarie Mwaura also points out that the clauses making up the duty need to be clarified and simplified.[113] This study will in chapter 3, attempt a clarification of the terms "good faith" and "success" within the context of the duty.

According to Musikali, a weak regulatory framework is one of the causes of poor corporate governance.[114] She notes that our corporate governance legislations are transplanted from

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[109]Elizabeth Nowicki, 'A Director's Good Faith' (2007) Buffalo Law Review 460, 463.

[110] Section 143 (1) of the Companies Act, Laws of Kenya.

[111] Keay (n69), 18.

[112] Loise Musikali, 'The Law affecting Corporate Governance in Kenya: A need for Review' (2008) Vol. 19 No. 7 ICCLR 213, 213.

[113] Kiarie Mwaura. 'Reforming the Duties of Directors under Kenyan Company Law: A Critique'. (2019) European Business Law Review 30, no. 4 617, 622.

[114] Ibid, 622.

markets with a strong legal system and different corporate culture from Kenya. She goes on to state that as long as these legislations continue to be used in the current state, then the efforts to advance corporate governance in Kenya will not bear much fruit.[115] Musikali, while reviewing the laws touching on corporate governance in Kenya, notes that there is a need to tailor the laws to the local circumstances, but does not discuss further how the localization can be done and what unique circumstances need to be considered. This study will seek to find ways through which the duty to promote the success of a company can be tailored to suit the Kenyan circumstances and identify key indicators that are unique to the Kenyan banking environment.

Soulton in his article makes an analysis of the duties of a director.[116] He argues for balancing of the protection of shareholders with the management accountability. That management accountability makes managers accountable. This can help in reducing the incidents of failure.[117] Even as this study looks at how best to hold directors of banks accountable and enforce good corporate governance in the performance of their duties, it is cognizant that a dilemma is created. The dilemma lies between making these executives accountable to the shareholders and giving them the autonomy, the motivation and control over the means by which they need to create and seize investment prospects for to company to have a better competitive edge pointed out by Nambiro.[118] This study will therefore aim

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[115] Ibid, 623.

[116] Daniel Saltoun, 'Fortifying the Director Stronghold: Delaware Limits Director Liability' (1988) Boston College Law Review 231, 232.

[117] Ibid, 235.

[118]Christine Nambiro, *Relationship between level of implementation of CMA guidelines on corporate governance and profitability of companies listed at the Nairobi Stock Exchange* (University of Nairobi Press, Nairobi 2007) 72.

at striking a balance between regulation and encouraging the directors to act in the best interest of the company. Too much regulation and there will be a shortage of persons willing to take up the role of directors. On the other hand, little regulation will not achieve the desired result of promoting success of banks.

1.6 Research Questions

The research questions this research will address include;

1. Why is a bank director's role critical in the success of the bank?
2. What is the nexus between good corporate governance and the success of a bank?
3. What are the weaknesses in enforcement of director's duty to promote the success of the bank?
4. What reforms are required to address these weaknesses?

1.7 Hypotheses

The first hypothesis of this research is that banks are likely to succeed when its directors appreciate the critical nature of their role and perform their duties well. The second hypothesis is that successful banks are those that comply with good corporate governance practices. The third and last hypothesis is that the success of a bank is largely hampered by weak enforcement mechanisms inherent in the duty to promote the success of the bank as codified.

1.8 Theoretical Framework

1.8.1 Introduction

This part of the paper focuses on the concepts and existing theories in support of the study. This study shall focus first on the agency and the stewardship theories in order to identify their shortcomings. Based on these shortcomings the study discusses, the enlightened shareholder value theory in light of section 143 of the Kenyan Companies Act. This study will therefore contribute to increase the understanding of the theories of corporate governance and discover the most suitable for the time being.

1.8.2 The Agency Theory (Shareholders Theory)

The agency theory posits that a director is an agent of the principal.[119] The owners are principals and the managers are the agents.[120] That it is upon the agents to avoid agency loss in that returns to the principals should not fall below what they would be, if the principals, the owners, exercised direct control of the company.[121] According to this theory, the main aim of the corporation is to act as a tool for shareholders to maximize profits from investing their wealth in the company.[122]

In this case, the director is required to act in the best interest of the principal. Acting in the best interest entails that the director is required to work towards shareholders wealth

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[119] Lex Donaldson and James H Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) Australian Journal of Management 52, 54.

[120] Michael Jensen and William Meckling, 'Theory of the Firm, Managerial Behavior, Agency Cost and Ownership Structure' 3(1976)4 Journal of Financial Economics 309, 309.

[121] Ibid, 310.

[122] Steve Letza, Xiuping Sun and James Kirkbride, 'Shareholding versus stakeholding: a critical review of corporate governance' (2004) Corporate Governance, 12(3), 62,90.

maximization.[123] In the event of conflict between shareholders and non-shareholders, the interests of shareholders will prevail.[124] Consequently, the theory leaves no room for consideration of non-shareholders such as customers or the environment.[125] This theory goes against the spirit of section 143 of the Kenyan Companies Act. The Act provides for consideration of all the stakeholders interests.

One advantage of the agency theory is that it creates a most conducive environment for wealth creation and promotes economic growth. Investors are likely to be motivated by huge profits. Such motivation acts as an incentive to investment and often leads to more production of goods and services, in the process creating job opportunities.[126] This theory promotes the idea of private ownership and freedom to shareholders to determine how to invest their wealth.[127] Another advantage of this theory is that, with the confidence that their interests will be paramount, shareholders go on to appoint directors they trust with the expectation that they will act in their best interest.[128] The theory advances the idea that the shareholders are best suited to oversee directors and ensure that they fulfill their

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[123] Anant K. Sundram and Andrew Inkpen, 'The Corporate Objective Revisited' (2002) 15 (3) Organization Science Journal 350, 361.

[124] Andrew Keay, 'Shareholder primacy in corporate law: Can it survive? should it survive?' (2010). European Company and Financial Law Review,7(3), 369, 392.

[125] Deryn Fisher, 'The enlightened shareholder - leaving stakeholders in the dark: Will Section 172(1) of the companies act 2006 make directors consider the impact of their decisions on third parties?' (2009) International Company and Commercial Law Review, 20(1), 10, 11.

[126] Sarah Kiarie, 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the united kingdom take? (2006) International Company and Commercial Law Review, 17(11), 329,340.

[127] Ibid, 332.

[128] Andrew Keay, 'Ascertaining the corporate objective: An entity maximisation and sustainability model' (2008) Modern Law Review 71(5), 663, 671.

duties.[129] Finally, there is only one object of the company, profit maximization, making the directors duties clear and precise.[130] It therefore makes the management of the company easier.

With the current legal dispensation, this theory may not be sufficient. The Agency theorists actually recognize that modern corporations often have many shareholders making it challenging for the managers to determine which shareholders they to take instructions from.[131]

According to agency theory, the agent often strives to achieve his personal gains at the expense of the principal. Managers, being the agents, are often allowed a lot of discretion that they may use towards own personal goals. They work to maximize their own personal gain rather than focusing on maximizing shareholders wealth.[132] To reduce this agency problem it is imperative that the principals closely monitor the agents.[133] Boards of directors are deemed as an essential tool to protect shareholders from exploitative managers. The board also helps to effectively monitor managers to ensure that they do not maximize their personal-interest to the detriment of the company's success.[134] The catch however is that Directors too, are managers of other people's money. As such, they cannot

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[129] Ibid, 673.

[130] Ibid, 673.

[131]Adolf Berle Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (New York, Macmillan 1932) 14.

[132] Muganda Munir Manini and Umulkher Ali Abdillahi, 'Corporate Governance Mechanisms and Financial Performance of Commercial Banks in Kenya' (2015)17Journal of Business and Management 25,40.

[133] Ibid, 40.

[134] Ibid, 41.

be fully expected to watch over it with vigilance.[135] It is therefore, expected that directors too can breach their duties in order to benefit themselves. Monitoring by the shareholders alone is very narrow. Other stakeholders may also play a part in ensuring accountability. These stakeholders may even include the communities, who ensure that the company does not declare profits at the environments expense.[136]

To counter the above agency problem, companies are usually advised to give incentives to the directors and management. However, companies can attend to the agency problems by having strict measures to address director's liability. Addressing director's liability can aid in addressing breach of director's duties. Since each director is an agent, it is important to address each director in his individual capacity concerning his individual duties as recommended in chapter 4 of this study. Corporate governance mechanisms are cleverly designed to align the interests of the managers with those of the owners and to constrain the opportunistic behaviors of managers, generally to solving agency problem.[137]

It is worth noting that the agency theory does not completely ignore stakeholders. The legitimacy of stakeholders is recognized according to applicable laws, thus watering down the agency theory.[138] Incidentally, even when a company focuses on promoting only shareholder interests the company may indirectly promote the interest of other stakeholders. For instance, by paying taxes, it may contribute generally to the total social

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[135]Christine A. Mallin, *Corporate Governance* (2nd Edn Oxford University Press, 2006) 13.

[136] Edward Freeman, '*Strategic management: A stakeholder approach*' (2010 Cambridge, UK: Cambridge University Press), 13.

[137] Manini and Abdillahi (n133), 41.

[138] Such laws include the employment laws, the law of contract, environmental laws, among others.

welfare.[139] The agency theory is therefore crucial to this study but deficient in some ways as discussed.

1.8.3 The Stewardship Theory (Stakeholders Value Theory)

In order to address the deficiencies discussed under the agency theory, this study now looks at the stewardship theory. The theory looks at directors as stewards rather than agents. It posits that directors will pursue a collective benefit of all rather than an individual benefit.[140] According to the Stewardship theory, company directors are believed to be acting on the best interests if the company as a whole and are deemed to be good stewards.[141] This theory therefore perceives a strong link between directors of a company and its success. It also focuses on all parties affected by a company's activities i.e. the stakeholders, in line with section 143 of the Kenyan Companies Act. This theory involves employees and other stakeholders in decision-making processes.[142] This is because the activities of a corporation have an effect on other elements in the society.[143] In other words, the objectives of the company should consider other things, for instance, the environment. Such considerations lead to business success.[144] This theory therefore redefines success,

[139] Andrew Keay, 'The global financial crisis: Risk, shareholder pressure, and short-termism in financial institutions - does enlightened shareholder value offer a panacea?' (2011) Law and Financial Markets Review, 5(6), 435,438.

[140] Atieno Awuor, 'Corporate Governance Problems facing Kenyan Parastatals: A case study of sugar industry', unpublished thesis for Master of Laws thesis, Bucerius Law School, July. 2009, 20.

[141]Donaldson and Davis (n119) 65.

[142] Kiarie (n126),339.

[143] Ibid, 340.

[144] Letza et. al, (n122), 91.

such that a company can only succeed if its activities are informed by consideration of all the members' interests.

An advantage of this theory is that it is not concerned only with profit maximization. The company is allowed liberty to consider the nest interests of other stakeholder like consumers or employees.[145] Advocates of this theory have argued that prioritizing ethical, social and environmental responsibility leads to increased profits by reducing costs, for instance, costs related to reputation building.[146]

As much as this theory supports the inclusion of all stakeholders as provided in the Companies Act, it exposes the challenges brought about by the duty to promote the success of the company. The challenges are discussed in chapter 2 of this study. There are therefore several possible disadvantages to this theory. The main disadvantage is that it fails to offer a comprehensive objective of the company, leaving directors without clear guidelines. As a result the company may suffer managerial uncertainty on what its objectives are, making it incapable of competing efficiently.[147] Proponents of the theory argue that the theory is grounded on the doctrine of fairness, and stakeholders should be treated with dignity.[148] Nevertheless, it has been contended that 'fairness' is not a clear concept since it cannot be measured by any objective standards.[149] Similarly, concepts such as 'good faith' as used in the Act also create uncertainty. Another disadvantage is that, the theory is unclear

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[145] Fisher (n125), 12.

[146] Kiarie (n126), 341.

[147] Jörg Andriof, Sandra Waddock, Brian Husted and Sandra Sutherland Rahman (eds.) *'Unfolding Stakeholder Thinking: Theory, Responsibility and Engagement'* (Greenleaf Publishing, 2003).

[148] Keay (n139), 438.

[149] Ibid.

on which stakeholder the directors are accountable. There does not seem to be clarity on the hierarchy or priority of stakeholders.[150] The list under section 143 is not exhaustive, but highlights areas of particular importance, such as the interests of the company's employees and the impact of the company's operations on the community and the environment'. As a result, it may be difficult for directors to organize stakeholders according to priority while promoting the success of the company. In addition, it is not clear what happens if the interests of one or more stakeholders come into conflict with promoting the success of the company?[151] Section 143 provides little or no guidance neither to the directors nor to the courts yet the directors are tasked with making corporate decisions, or the courts with reviewing the actions of the directors. This shortcoming may lead companies to grant directors wide discretionary powers, demanding less accountability.

There is also difficulty in determining the grade of interest of each individual within a certain class of stakeholders; for instance, some employees require more salary than others due to their job descriptions. Moreover, this theory may also be unworkable since involvement of stakeholders and their roles are not outlined.[152] It is up to directors' to exercise their discretion to determine the extent of involvement of the stakeholders, thus, defeating the very objective of the Act.

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[150] Andrew Keay and & Zhang, H. 'An analysis of enlightened shareholder value in light of ex post opportunism and incomplete law' (2011) European Company and Financial Law Review, 8(4), 445-475.

[151] Keay (n124), 392

[152] Ibid, 393.

Like the agency theory, the stewardship theory attempts to explain the role and behavior expected of directors in achieving the goals of the company.[153] Further, like agency theory, stewardship theory recognizes that a form of agency does exist in the corporate setting. However, the stakeholder theory differs from the agency theory in that it essentially holds that the agents will not be concerned about fostering their own economic interests. That they will want to act in the best interests of their company and in such a way that leads to profit maximization rather than self-serving interests. That their personal needs are incidentally fulfilled as a byproduct of working towards the organizational goals.[154]

The issue of accountability and transparency on the side of the directors remains a big problem in today's vast corporate divide where shareholders are now remotely connected to the entity.[155] This theory therefore gives guidance on how the duty to promote success of a company can be achieved while taking into consideration the various stakeholders interests. However, it exposes some challenges that the ESV theory attempts to address. Furthermore, the Stewardship theory only looks at success from the point of view of stakeholder involvement. This theory does not look at the aspect of ensuring perpetuity of the company as envisaged by the Act.

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[153] Ibid, 393.

[154] James Chrisman, Jess Chua, Franz Kellermanns and Erick Chang, 'Are Family Managers Agents Or Stewards? An Exploratory Study In Privately Held Family Firms' (2007) 60 Journal of Business Research 1030, 1033.

[155] Bob Tricker and Robert Ian Tricker, '*Corporate governance; principles, policies and practices'* (oxford university press inc.:New York 2009) 57.

1.8.4 Enlightened Shareholder Value (ESV) Theory

Enlightened Shareholder Value (ESV) theory is a recent approach to corporate governance. The directors' fiduciary duties as codified are anticipated to transform the legal position of the corporation in the wider corporate and social environment.[156] Advocates of this theory argue that the theory emanated from the failure of stewardship theory in achieving the expected result in the new corporate arena.[157] ESV aims to achieve profit maximization as the main goal of the company. However, this interest is subject to consideration of stakeholder interests.[158] According to ESV theory, a stakeholder is any group or individual who can affect or is affected by the achievement of the corporation's purpose'.[159] Theorists propose that this is the best method of ensuring sustainability and generally securing prosperity and welfare.[160]

ESV differs from stewardship theory since the former tends to prioritize the interests of the shareholders. However, as with stewardship theory, no member is seen to have direct priority over others.[161] This theory therefore demands that directors follow long-term strategy in considering the interests of the company.[162] The main difference between ESV and Stewardship theory is that ESV follows long-term strategy.[163] The ESV approach

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[156] Kosgei (n64), 8.

[157] Stelios Andreadakis, 'Corporate governance in the aftermath of the scandals: The EU response and the role of ethics' (2010) Doctor al dissertation University of Leicester, Leicester, England, 11.

[158] Kiarie (n126), 340.

[159] Freeman (n136), 13.

[160] Ibid, 13.

[161] Andreadakis (n157), 13.

[162] Olusola Akinpelu, '*Corporate governance framework in Nigeria: An International review'* (Indiana, USA: iUniverse, 2011).

[163]Andreadakis (n157), 13.

discourages an exclusive focus on the short-term financial goals, seeking a more inclusive approach, one that is based on building long-term relationships.[164] It is considered as a 'third way' because it was derived by integrating aspects of the agency and stewardship theories.[165]

Stakeholders play an important role in the success of a company and their interests should be considered. For instance, having a good relationship with the community in which the company operates bestows goodwill on the company and acts as a 'social license to operate'.[166] With such goodwill, companies are likely to contribute towards local community policies and disaster management. In the end, the company will enjoy good opportunities to air their grievances should it encounter any environmental challenges. Similarly, if the company does not concern itself with environmental issues, its reputation among the stakeholders will be negatively affected, offering competitors an advantage over it.[167]

There are several arguments in support of this theory. In light of the duty, the supporters of ESV argue that adopting this approach does not require much change in the duties of directors nor in the main object of the company.[168] As such, the directors are certain of the company's objects and are confident to steer the company in that direction.

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[164] J. Loughrey, A.Keay and L. Cerioni, ' Enlightened Shareholder Value and the Shaping of Corporate Governance' (2008) 8 Journal of Corporate Law Studies 79.

[165] Cynthia Williams and John Conley 'An emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct' (2005 Cornell International Law Journal, 38(2), 494, 523.

[166] Luca Cerioni, 'The Success of the Company in section 172(1) of the UK Companies Act 2006: Towards an 'Enlightened Directors' Primacy?' (2008). Original Law Review, 4(1), 2, 29.

[167] Ibid, 32.

[168] Andreadakis (n157), 14.

Another advantage of this theory is that it adopts long-term plans. Section 143 is clear that success of the company entails its perpetuity. It has been claimed that such long-term plans may lead to an increase in the profitability and stability of a company. This is because the company gains market confidence and economic effectiveness. Unlike the Stewardship theory, ESV focuses on achieving the long-term benefits by considering internal and external stakeholders leading to sustainability of the business.[169] For instance, ESV gives employees of a company some confidence that their contracts may not be terminated in the short term, and this confidence is reflected in employee productivity.[170]

In countries such as Kenya, which have codified ESV, directors are entitled to consider stakeholders without any fear of being sued by shareholders.[171] For ESV, the priority remains wealth maximization for the shareholders thus partially responding to the problem of stakeholders.[172] Companies adopting ESV are more likely to attract investors.[173] Moreover, proponents of ESV have argued that stakeholders' interests are better protected and enhanced through laws rather than corporate governance. However the theorists are cognizant sometimes laws do not cover all stakeholders, and contracts may be

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[169] Andrew Keay, 'The Duty to promote the Success of a Company: Is it fit for purpose?' (2011) University of Leeds School of Law, Centre for Business Law and Practice Working Paper 4 17, 17.

[170] Thomas Clarke, *International corporate governance: A comparative approach* (Routledge, London, 2007) 34.

[171] Keay (n 169), 20.

[172] Virginia Harper Ho, 'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) The Journal of Corporation, 36(1), 59, 78

[173] Kiarie (n126), 340.

inequitable.[174] In summary, ESV does not entail creation of a balance between stakeholders.[175]

Opponents of ESV, particularly the contractarians who support the agency theory, posit that shareholders do not need to play any role towards corporate governance, since the board of directors should be protecting their interests.[176] They argue that no real rights are granted to stakeholders since the rights are not easily enforceable. For instance, section 143 of the Kenyan Companies Act, gives very little protection to Stakeholders' rights since it only requires directors to do their duty in good faith while promoting the success of the company.[177] Therefore, directors may only be required to do the bare minimum, not having to make strong arguments in their defense.[178] In addition, if even if the rights were capable of enforcement, the duty has been criticized for lacking any methods of enforcing directors' breaches to the duty.[179] Consequently, the directors may become less passionate about taking into account stakeholders' interests. Nevertheless, when the Companies Act codified the duty, it was considered to bring something novel to corporate governance.

From the above discussion, ESV seems a better theory at present than either of the alternatives. It seems to have succeeded to some degree in filling the loopholes in both the Agency and stewardship theories and merging the advantages of both.[180] It offers the best

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[174] Kiarie (n126).

[175] Ibid.

[176] Mwaura, Kiarie. 'Reforming the Duties of Directors under Kenyan Company Law: A Critique' (2019) European Business Law Review 30, no. 4, 617, 619.

[177] Kiarie (n126), 341.

[178] Ho (n172).

[179] Ibid.

[180] Kiarie (n126).

option since it prioritizes profit maximization, requires consideration of stakeholders' interests and long-term sustainability of the company.[181] Therefore, ESV appears to have more accountability compared to agency and stewardship theories.

1.8.5 Summary of the theoretical framework

	Theory	Key highlights
1.	Agency Theory (Shareholder Theory)	• The main aim of the corporation is to maximize profits for shareholders without considering other stakeholders. • A director only acts in the best interest of the shareholder.
2.	The Stewardship Theory (Stakeholders Theory)	• Directors aim to pursue a collective benefit of all stakeholders rather that individual gain. • Directors act in the best interest of the company as a whole.
3.	Enlightened Shareholder Value (ESV) Theory	• Directors aim to achieve profit maximization as the main goal of the company but subject to consideration of stakeholder interests. • Directors focus on ensuring sustainability of the company in the long-term.

[181] Ibid.

1.6 Research Methodology

In the quest to investigate the research problem identified above, this study embarked on research. This study required data that would be describe, interpret, contextualize and give insight into the research. As such, the study carried out desktop and qualitative research through interviews. The study was therefore conducted through primary and secondary research. The first aspect of research involved gathering and analyzing information already in books, journal and newspaper articles, reports, statutes and case law. The study reviewed the existing literature at the University of Nairobi, School of Law library. The study also made use of online sources to view and download literature. All the literature reviewed was obtained through this desktop method of research. The study reviewed numerous relevant sources but not all of them were useful to address this study's research problem.

The study carefully selected the desktop data used for the study, considering the context and purpose for which the data was collected. However not all the data collected from the desktop research is recent. This is because the research problem had been considered in the UK when their Companies Act was enacted in 2006. The Kenyan Companies Act was enacted in 2015. That explains why some of the desktop data relied on goes back before 2015. Through this desktop research, I was able to identify some gaps, which then formed the basis of my fieldwork.[182]

The second aspect of the study involved fieldwork. The fieldwork was purposed to address the aspects of the research problem that the desktop research did not address. The fieldwork was also aimed at complementing the desktop research findings. I identified a pool of

[182] See Paul Hague & Conor Wilcock, 'How To Get Information For Next To Nothing' <https://www.b2binternational.com/publications/desk-research/> accessed on 5 November 2019.

respondents from which I proceeded to select a sample for gathering of the primary data. I collected the primary data by way of face-to-face interviews.[183] The interviews were voluntary and the study assured the respondents of anonymity. This method was suitable because it allowed me to get further information that was relevant and not strictly as per the questionnaire.[184] To arrive at a conclusion, a sample of the population was interviewed to determine whether the directors' duty to promote the success of a bank is sufficient as captures in the Kenyan companies Act and whether it was enforceable.

The researcher collected the primary data personally. This was crucial to ensure that even the non-verbal communication was captured. The questionnaire had a number of open-ended questions that required the respondent to explain further and offer opinions.[185] As such, the data collection took slightly over eight months.

The research targeted a sample size of thirty five respondents through a stratified sampling method.[186] The population was divided into distinct categories from which individual

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[183] See also L. Musungu and J. W. Nasongo, who used face to face interviews because it helped establish a rapport with the respondents; L. Musungu and J. W. Nasongo, 'The head-teacher's instructional role in academic achievement in secondary schools in Vihiga district, Kenya' (2008) Educational Research and Review Vol. 3 (10), pp. 316, 320.

[184] See appendix III of this study.

[185] Most of the respondents explained their responses in an elaborate manner offering insight that was would not have been captured had the study opted to use a closed-ended questionnaire. See also Chetcuti and Kioko who used the open ended questions in order to get in-depth answers; Deborah Chetcuti & Beriter Kioko Girls' Attitudes Towards Science in Kenya, (2012) International Journal of Science Education, 34:10, 1571-1589,

[186] The sampling was obtained from bank directors and stakeholders; see list of respondents in schedule IV of this study. See also Josiah Nyauncho and Isaac Nyamweya, who preferred the stratified method since the respondents belonged to different categories, carrying out different roles; Josiah Nyauncho and Isaac Nyamweya, 'Assessment of the effect of Cost Leadership Strategy on the performance of Liquefied Petroleum Gas Companies in Eldoret town, Uasin Gishu County, Kenya' International Journal of Business and Management Invention ISSN (Print): 2319 – 801X, 4.

participants were selected.[187] The individuals in the sample included directors of banks, enforcement agents from the Central bank of Kenya and the Capital Markets Authority, the Judiciary, scholars of corporate governance and stakeholders in the banking industry. The reason for this approach was to ensure that the research captured a broad spectrum of respondents from all the key areas of the study.

The people interviewed were male and female and were drawn from Nairobi, though the gender did not have any bearing on the findings. Further, the fact that the respondents were only from Nairobi did not prejudice the research in any manner because the information sough does not impact on geographical importance.

A structured questionnaire was used.[188] The questionnaire contained questions that covered various issues that this study sought to investigate. The researcher tested the questionnaire through a mock interview and amended to ensure that the questions were clear enough to extract the information required to cover all the parameters to be tested.[189] After several tests, the final questionnaire was found to be fit for the purpose.

Appointments for the interviews were made through phone calls and emails.[190] Contacting some of the respondents to schedule an interview was challenging, but with the assistance of the supervisor of this study, the interviews were scheduled. The questionnaires were sent

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[187] Chetcuti and Kioko (n184), 1590.

[188] Ibid, 1590.

[189] Ibid, 1591.

[190] Satirenjit Kaur Johl and Sumathi Renganathan recognize that phone calls and emails are an important tools of obtaining access to the research field; Satirenjit Kaur Johl and Sumathi Renganathan, 'Strategies for Gaining Access in Doing Fieldwork: Reflection of two Researchers' The Electronic Journal of Business Research Methods Volume 8 Issue 1 2010, 42, 42.

to the respondents in advance on email.[191] The respondents were assured anonymity and pseudonyms were used instead of actual names in presentation and analysis of the data collected.

The data was only captured in writing to ensure the anonymity of the respondents. The data collected was recorded strictly in the questionnaires that were retained by the researcher and stored in the research file.

The time estimated for each interview was thirty minutes. This turned out not to be the case as all the interviews took longer. Some respondents had a lot to say and we ended up taking an hour with them. For example, with Taji[192] we took one hour, this was because of his vast knowledge of corporate governance matters and specifically of responsibilities of the board of directors of companies.

The total numbers of individuals actually interviewed were 19 out of the 35 initially intended to be interviewed. This was 54.3% of the intended sample. Some of the people who were contacted for the interview by email did not respond. Those contacted via telephone promised to call back but did not. Further, some of the ones who responded either cancelled the appointments or were too busy to have the interview. The interviews were conducted during the period of December 2018 to June 2019.

Before conducting interviews, most respondents sought to know the purpose of the interview. The researcher was able to assure the respondents that the research was towards a school project. The researcher applied to the National Commission for Science,

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[191] Sending the questionnaires in advance gave the respondents sufficient time to interrogate the issues raised and the study obtained quality responses.

[192] Taji (n1).

technology and Innovation (NACOSTI) for a research license. The application was done online through the NACOSTI website. The researcher was required to attach copy of the study proposal for NACOSTI to determine the nature of approval to be granted. Since the research did not touch on matters of national security, no further details were required from the researcher. The application was granted and the license issued.[193]

Finally, the study has acknowledged all the sources of information used.

1.7 Limitations

Many of the respondents are bank directors, company secretaries and enforcement agents with busy schedules. Getting interviews was quite challenging and not all the respondents in the sample participated. Nevertheless, the interviews with those who responded were very resourceful to cure this gap.

1.8 Chapter Breakdown

Chapter 1- Introduction

This chapter introduces the study and states the problem. It justifies the study and provides a theoretical framework on which the study is based on; it reviews existing literature on the topic, states the research objectives and formulates research questions and hypotheses. It also identifies the methodology used in the research and limitations to the study.

[193]Copy of research permit from NACOSTI attached as Appendix II to this thesis.

Chapter 2 – Corporate Governance and Director's duty to promote success of the Bank

This chapter analyzes how success in the banking industry is influenced by the actions of directors in banking institutions and how their actions lead to success or failure. This chapter will investigate how the banks that are performing well have been able to do so. It will also look at the instances where the duty has been breached therefore resulting into failure. This chapter reports the results of the fieldwork.

Chapter 3 – Ensuring Success of Banks

This chapter identifies the shortcomings of the regulations that provide leeway for irresponsible directorship leading to the failure of banks. It focuses on enforcement of the duty to promote the success of a bank. This chapter continues to report the results of the fieldwork.

Chapter 4 – Conclusion and Recommendations

This is the last chapter outlining the results of the research and recommending the way forward.

The devil is in the detail[1]

CHAPTER TWO: CORPORATE GOVERNANCE AND A BANK DIRECTOR'S DUTY TO PROMOTE SUCCESS OF THE COMPANY

2.1 Introduction

One of the objectives of this study is to establish the link between corporate governance and performance of a bank. Corporate governance is described as a system that guides operations of companies while regulating, monitoring and controlling them in order to promote fairness, transparency and accountability.[2] In order to maintain investors' confidence, good performance of a bank and addressing problems of corporate misconduct and behavior, sound corporate governance is vital.[3] Due to the growing number of banking and corporate scandals, a number of governance codes and best practices have developed around the globe.[4] The Sarbanes-Oxley legislation in USA, Cadbury Committee recommendations for European Union companies, and the OECD principles of corporate governance are the best-known examples of them.[5]

In Kenya, prior to the enactment of the Companies Act in 2015, directors' duties of care, skill and diligence and fiduciary duties were governed by common law. These duties were

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[1] Interview with Jamila, Nairobi, Kenya 26 April 2019; Jamila explained that the wording of the duty is what hampers the effective discharge of the duty.

[2] World Bank. *Global development finance 2009 : charting a global recovery : Review, analysis, and outlook (English).* Global development finance. Washington, DC: World Bank. 2009.

[3] Mahmood Imam and Mahfuja Malik, 'Firm performance and Corporate Governance Through Ownership Structure: Evidence from Bangladesh Stock Market' (2007) International Review of Business Research Papers 3 (4), 88, 91.

[4] Ibid, 91.

[5] Ibid, 93.

largely informed by the Agency Theory, which has been discussed in chapter 1. In *Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation)*[6] the court was guided by the principles pronounced in the 1925 decision in *Re City Equitable Fire Insurance Company Ltd*.[7] The court found that the appellant and the 2nd respondent, as directors of Trust Bank Limited, were agents of the Bank. As such, they owed the bank fiduciary duties of loyalty and good faith. They also owed the duty of care and skill in discharge of their duty as directors of the Bank.

This position has since changed due to the inherent problems of the Agency Theory, common law and the evident changes resulting from globalization and international economic trends such as the rise corporate governance. These common law duties were un-codified and generally inaccessible to an ordinary company director and, thus, inadequate to regulate directors' behavior not to mention the inherent problems presented by common law.[8] The Companies Act provides that a director shall act in the way in which he or she considers, in good faith, would promote the success of the company for the benefit of its members as a whole.[9] This provision embraces the ESV theory.[10]

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[6] *Ajay Shah v Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In Liquidation) & Praful Shah* [2016] eKLR; The appellant and 2nd respondents were directors of Trust Bank Limited. It was the 1st respondent's claim that the appellant and 2nd respondent in their capacity as directors of Trust Bank Limited were guilty of misfeasance and breach of trust. The legal issue was the nature of duty that the appellant and 2nd respondent in their capacity as directors owed Trust Bank Limited as a company. The relevant legal question is whether the directors of a company owe any duty to the company and the nature of that duty.

[7] *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407

[8] Mercy Kinyua, 'A Case for the Statutory Codification of Directors' Duties in Enhancing Good corporate governance in Kenya: A case study of the National Bank of Kenya' Unpublished Thesis for the Degree of Master Of Laws (LL.M) of the University Of Nairobi. November 2014, 1.

[9] Section 143, Companies Act, 2015, Laws of Kenya.

[10] See discussions under chapter 1 on the ESV theory.

A gap was identified in the literature review, whereby the definition of the duty was still vague. The Companies Act attempts a definition on the acts of directors, which if done in good faith would promote the success of the company.[11] The Act provides that directors should consider:

(i) the long-term consequences of their actions;

(ii) the interests of their employees;

(iii) the need to develop good relations with customers and suppliers;

(iv) the impact of the company on the local community and environment

(v) the desirability of maintaining high standards of business conduct and a good reputation; and

(vi) The need to act fairly as between all members of the company.

From the above breakdown of the duty, it is now clearer in whose interests the directors should act. It appears that the Companies Act now negates the Agency and the stewardship theories in favour of the ESV theory.[12] The series of factors listed in the section, refer to the promotion of social, environmental and governance objectives for the benefit of the members as a whole.[13]

2.2 Importance of Bank Regulation

Bank regulation is a form of control, which works by subjecting banks to certain requirements, restrictions and guidelines these controls are intended to create transparency

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[11] Companies Act (n9).

[12] The theories have been discussed in chapter 1.

[13] Imam and Malik (n3), 93.

between banks and the stakeholders with whom they engage in business.[14] Various authors have justified the enhanced scrutiny of banks. From the fieldwork carried out, it is agreed that banks are subjected to a higher degree of scrutiny than other companies are.

A bank, in addition to regulation by the Companies Act, under which it is incorporated is also licensed and regulated by Central Bank of Kenya. There are also the Prudential Guidelines (PG's) which are bulky and very comprehensive. If the bank is listed on the Nairobi Securities Exchange (NSE), it is further regulated by the Capital Markets Authority (CMA), NSE and Central Depository and Settlement Corporation (CDSC) Regulations. If the bank also engages in insurance through bancassurance, there is the Insurance Regulatory Authority (IRA). There is also the usual regulation by the Retirement Benefits Authority (RBA).[15]

Bahati observes that;

> 'The enhanced regulation of the banking industry is justified due to the risks posed by the financial institutions. Any form of non-compliance may lead to failure and the failure of a bank affects all other businesses and institutions, as they cannot transact. The whole economy would be affected.'[16]

Banking activity has a number of peculiar features, which distinguish it from companies that engage in other areas of business. The most important distinguishing aspect is the

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[14] Joanna Benjamin, *Financial Law* (2007, Oxford University Press), 7

[15] Interview with Bahati, Nairobi, Kenya 25 February 2019. See also Daniel Mwirigi Amanja, 'Financial Inclusion, Regulation and Stability: Kenyan Experience and Perspective' presented during the UNCTAD's Multi-Year Expert Meeting on Trade, Services and Development held in Geneva, Switzerland May 11-13, 2015.

[16] Bahati (n15).

extreme volatility arising from risks inherent in the banking business and which volatility, economists consider creates a thin line between profitability and failure.[17]

Given the interconnectedness of the banking industry with the national economy, and the economic reliance on the banks, it is important for regulatory agencies to closely monitor the standardized practices of these institutions.[18] Banking institutions have massive control over the economy and their failure occasions enormous consequences.[19]

Generally, banks occupy a delicate position in the economic equation of any country such that their performance invariably affects the macro economy of the nation.[20] Poor corporate governance may contribute to bank failures, which can pose significant public costs and consequences. This is due to their potential impact on any applicable deposit insurance systems and the possibility to broader macroeconomic implications.[21] In addition, poor corporate governance can lead markets to losing confidence in the ability of a bank to properly manage its assets and liabilities including deposits. This could in turn trigger a bank run and consequently a liquidity crisis where the banks become incapable of meeting the regulatory thresholds on liquidity in addition to its business being paralyzed.[22]

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[17] Dan Lupu & Andra Nichitean, 'Corporate Governance and Bank Performance in Romanian Banking System' (2011) 11 1 (13), Fascicle of the Faculty of Economics and Public Administration 219, 225.

[18] Jean-Charles Rochet, *Why Are There So Many Banking Crises? The Politics and Policy of Bank Regulation* (USA, Princeton University Press, 2009) 21.

[19] Alex Anameje, 'Application of Corporate Governance in Banking' 2007 Nigerian Bankers, 1697, 1698.

[20] Ibid, 1698.

[21] Ibid, 1699.

[22] Desmond Ifeanyi, 'Corporate Governance and Bank Failure in Nigeria: Issues, Challenges and Opportunities' [2011] Nworji Research Journal of Finance and Accounting Vol 2, No 2, 3, 27.

The banking industry is often subject to closer scrutiny than other industries particularly in times of financial crisis.[23] As studied by Christopher Wilson, indeed a uniqueness that comes with being a director in a bank.[24]

It, therefore, follows that bank directors carry a higher degree of risk than directors of other companies do. Over and above the industry-specific regulation of banking, bank directors are also concerned with the entire range of internal and external risks that all other companies encounter.[25]

The East African region central bank governors have been implementing regulations requiring banks to increase their core capital to withstand financial shocks amid rising non-performing loans.[26] These requirements are part of efforts by the East African Community partner states to implement the Basel III guidelines,[27] which were introduced globally after the 2008 financial crisis showed banks that they need to be more resilient to credit stress.[28] Following the collapse of imperial Bank in October 2016, Central Bank of Kenya directed all banks to review their business models and consider consolidation to withstand shocks, after observing financial distress in three banks — Dubai, Imperial and Chase.[29]

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[23] Ibid, 27.

[24] Christopher Wilson, 'Responsibility of a Bank Director' (1955) 72 Banking Law Journal 55, 57.

[25] Ifeanyi (n22), 27.

[26] The East African, 'Regional banks face closer scrutiny in 2019 to stem wave of closures' (Nairobi, 31 December 2018) 2.

[27] Basel III is a set of international banking regulations developed by the Bank for International Settlements to promote stability in the international financial system.

[28] The East African (n26), 2.

[29] Ibid, 2.

During the literature review, this study recognized that there might be some risk from emanating placing banks under microscopes. From an interrogation of the observation that banks should be highly regulated, this study finds that most of the explanations given to justify the enhanced regulation of banks are either unsubstantiated or based on risks that are unreasonably considered, as the risks do not water down the economy.[30] Asha specifically states that;

> 'I do not believe that over regulating banks will result in success. In fact, other businesses do well without much scrutiny as they are given the liberty to do business. Reasons such as holding public funds do not hold water since these are private contracts and parties should carry out due diligence prior to entrusting the bank with their hard earned money, as they would with other entities. This makes bank depositors less concerned with the governance of banks since there is a 'big brother' watching the banks.'[31]

It is arguable that banks are inherently less stable than other businesses, given that these institutions take deposits that are withdrawable without notice and on demand. Banks are also susceptible to panic "runs" that may bring down otherwise solvent institutions.[32] Nevertheless, the fact that banks still collapse despite the heavy regulation is an indicator that regulation may be doing more harm than good. There is an element of risk in all businesses. However, when it comes to banking investors and depositors either lack market discipline or their market discipline is reduced to a large extent.[33] These regulatory policies create a lack of caution and skepticism that investors should interrogate before they commit

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[30] Findings from fieldwork.

[31] Interview with Asha, Nairobi, Kenya 27 February 2019.

[32] Peter J. Wallison, 'Why Do We Regulate Banks?' American Enterprise Institute, Banking and Finance Journal 2005-2006, 14.

[33] Ibid, 15.

funds to a bank.[34] A situation is, thus, created where the investors are lulled and do not scrutinize the bank they are investing with or depositing their funds with. Banks, on the other hand become less aggressive in doing business and end up generating less revenue.[35] From an economic perspective, there is little reason for the regulations. There is therefore need to shift focus from the external regulations and place the burden of ensuring the success of a bank squarely where it belongs: on the board of directors.[36]

Having weighed all the factors, the objectives of bank regulation, include first, reducing the level of risk to which bank creditors are exposed. Secondly, reducing the risk of market disruption in the banking environment causing multiple or major bank failures. Thirdly, to reduce the risk of banks being used for criminal purposes, e.g. laundering the proceeds of crime. Fourthly to ensure that customers are treated fairly and that banks are engaged in corporate social responsibility.

2.3 Importance of the board of directors towards promoting the success of the bank

2.3.1 Role of the board

This study has discussed various theoretical approaches on the directors' duty to promote success of a bank. This study proposes that the ESV is the most appropriate theory that explains the directors' role in light of that duty.

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[34] Ibid, 15.

[35] Ibid.

[36] See, Joshua Oigara while advocating for self-regulation; Joshua Oigara, 'Self-Regulation: A New Dawn for The Kenyan Banking Sector' June 2016 <https://blog.kcbgroup.com/self-regulation-a-new-dawn-for-the-kenyan-banking-sector/> accessed 9 October 2019, while advocating for self-regulation.

ESV is the idea that corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests.[37] The law now expressly allows the board of directors to consider non-shareholder interests, which are typically expressed in terms of a list including employees, customers, suppliers, creditors, and local communities.[38] It also allows the board to prioritize the shareholders' long-term financial interests over short term gains such as enhanced share price that may not be sustainable.[39] ESV gives preference to the promoting the success of the company. A question therefore arises as to the scope of the director's duty to promote the success of the company.

The duty requires the directors to consider the impact of the bank's operations on the community and the environment.[40] Public interests are also enshrined in the duty since the directors' duties and responsibilities to the community and environment are provided.[41] Social responsibilities, such as price reduction of goods and products, donations to charitable organizations, environmental initiatives and attending to community needs, would play a role I creating a good image of the company among its stakeholders.[42] Such social responsibilities also play a role of advertising the company, and the company is likely to create a good impact on the market.

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[37] David Millon, 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law' (June 16, 2010). Washington & Lee Legal Studies Paper No. 2010-11. Available at SSRN: https://ssrn.com/abstract=1625750 or http://dx.doi.org/10.2139/ssrn.1625750.

[38] Ibid.

[39] Ibid.

[40] Pervaiz Khan and Mirwais Kasi, ''Enlightened Shareholders Value' Approach under Section 172 of the UK Companies Act of 2006: An Analysis, (2017) Research Journal of Recent Sciences Vol. 6(6), 38, 39.

[41] Ibid, 40.

[42] Ibid, 40.

2.3.2 Constitution of a Great Board

Intrinsic to corporate governance is the accountability of directors. One mechanism that makes directors accountable is the provision of duties imposed on them by the law.[43] The character of the board members should be above reproach. This means that the members should be of good character and free from scandals such as corruption.[44] The board of directors can be used by a bank to influence its market credibility and this can only be achieved if the board members are people of integrity.[45] However, in some instances depositors do not always consider the board members and may consider other factors such as the bank's location, its products and the confirmation of its licensing and legal status by the CBK.[46]

A director's experience in banking is also imperative to the success of the bank. The performance of the individual banks, is a result of the decisions of the management governing these banks.[47] Therefore, directors with banking experience are better placed to make commendable decisions.[48] In other words, corporate governance has a major role to play in the development of the banking sector and this is best driven by players in that field. The concern over corporate governance stems from the fact that sound governance

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[43] Andrew Keay, 'The Duty to promote the Success of a Company: Is it fit for purpose?' (2011) University of Leeds School of Law, Centre for Business Law and Practice Working Paper 4 17, 17.

[44] Bahati (n15).

[45] Ibid.

[46] *Kimani Waweru & 4 others v Central Bank of Kenya & 7 others* [2018] eKLR

[47] Ibid.

[48] Ibid.

practices by organizations, banks inclusive results in higher firm's market value, lower cost of funds and higher profitability.[49]

The duty to promote the success of the Bank means that the board needs to have a strategic plan in place and focus on its implementation. It should be concerned about sustainability.[50] Section 143 applies all through a director's role. The section should guide the director contribution towards defining the company's strategy, outlining its culture, approving governance structures, settling business plans and budgets, setting policies and procedures and making business decisions. It applies to all decisions a director makes whether individually or collectively as a board. In big companies, management and employees are granted powers to make many more decisions, in the context of strategies and policies, which have been set by the board. While obviously the directors may not be consulted in making those individual decisions, such decisions are informed by the bank's strategy and that there are policies duly approved by the board that guides the decision making.[51]

For the board to be effective in promoting the success of the bank it is imperative that it is properly constituted. Having directors with diverse professional disciplines and perceptions helps. Having some directors who do not have banking experience enables the directors make better decisions devoid of influences from insider knowledge.[52]

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[49] Ifeanyi (n22), 28.

[50] Interview with Neema, Nairobi, Kenya 14 December 2018.

[51] DC100, 'Guidance on Directors' Duties: Section 172 and Stakeholder Considerations' (2018) < https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 16 May 2019.

[52] International Finance Corporation, 'From Companies to Markets - Global Developments in Corporate Governance' (2016) <https://www.ifc.org/wps/wcm/connect/5a764bef-bd5f-4b52-9d34-

In an analysis by Fratini and Tettamanzi, of the relationship between corporate governance and performance in Italian firms, it was perceived that a proper composition of the board has positive and statistically significant relationship with firm performance.[53]

This duty requires directors to actively engage in the affairs of the bank.[54] Some directors of banks do not allocate sufficient time towards the company's strategy and governance matters.[55] It is of concern that not all directors allocate sufficient time for training on governance matters and the CG Code- once a year is not enough.[56] As such, they are often unable to make meaningful contributions towards the strategy of the company. They do not review the strategy as often as required and do not keep track. Banks have a strategy committee yet most of the time the focus is not on strategy but rather ratifying management decisions. According to Bahati;

> 'Quarterly board meetings are not sufficient for the board to understand and appreciate what is happening in the industry. Beyond board meetings, directors should deliberately set aside time to read, discuss and get updated on current developments in the industry. It is worth mentioning that in some banks, board committees allocate a fair amount of time and in case of urgency feedback is given as needed.'[57]

Shaka notes that;

2eabde03e6f0/From-Companies-to-Markets%E2%80%94Global-Developments-in-Corporate-Governance-April-2016.pdf?MOD=AJPERES&CVID=liCJzzq> accessed on 3 February 2019.

[53] Fabrizio Fratini and Patrizia Tettamanzi, 'Corporate Governance and Performance: Evidence from Italian Companies' (2015) Open Journal of Business and Management, 3, 199-218

[54] Fred Hilmer, *Strictly boardroom: Improving Governance to enhance company performance* (2nd Edn, Melbourne : Information Australia, in association with The Sydney Institute, 1998) 32.

[55] Sanjay Anand, *Essentials of corporate governance* (Hoboken, NJ: Wiley, 2007) 25.

[56] Eduardos Tandelilin, H. Kaaro, Putu Mahadwartha, & Supriyatna, 'Corporate governance, risk management and bank performance: Does Type of Ownership matter?', (2007) 34 EADN Working Paper 52, 53.

[57] Bahati (n15).

> 'There are also banks where the main boards do allocate sufficient time to the banks strategy and governance matters. In fact, some banks hold more than two meetings in a quarter and they make use of technology such as WhatsApp and group emails to address pressing issues. Such boards add meaningful insights on the direction the bank will take. If the Directors are well prepared they will be able provide adequate oversight to management.' [58]

For a board to effectively discharge its responsibility in line with the duty, the board composition, qualifications, skills and experience are only a tip of the iceberg.[59] Neema, a Company Secretary in one of the local banks observed that:

> 'Directors' qualifications have an impact on the performance of the bank. Focus should be more on the correct competencies. Although individual qualifications are key, the collective skill set is more important that the individual qualifications. It is important to have a mix of both academic qualifications and entrepreneurial skills. Adaptability to change is also crucial especially if a strategy does not work or environmental changes occur in business.'[60]

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The Basel Committee on Banking Supervision (BCBS) revised the corporate governance principles highlighting the significance of the board's collective competence as well as the obligation of individual board members. BCBS emphasizes that the board should 'fit and proper' as a group.[61] The success or failure of a bank depends on the Board of Directors.[62]

2.3.3 A Board set for success

Great boards of directors pay attention to the world around. The banking business is dynamic and constantly changing. Banks need to adapt as fast as possible. The digital

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[58] Interview with Shaka, Nairobi, Kenya 1 march 2019.

[59]International Finance Corporation (n52).

[60] Neema (n50).

[61] Basel Committee on Banking Supervision, 'Guidelines, Corporate governance principles for banks' 2015 < https://www.bis.org/publ/bcbs294.pdf> accessed on 4 April 2019.

[62] Interview with Mwanaidi, Nairobi, Kenya 13 February 2019.

economy has brought much disruption to the conventional banking models. Much of this change is driven by ever evolving consumer preferences. Consumers now want access to banking and transact in the click of a button.[63]

The Board of Directors is appointed by shareholders to monitor the management and account to the owners of the company and it acts as a link between the organization and the outside environment.[64] This being the case, the board is vital to the governance of every company and a key participant in the corporate governance arena.[65] Accordingly, many jurisdictions are aware that a company should be led by an effective board, one that fully takes responsibility for its governance. The board should also focus on upholding efficiency, accountability, responsibility, integrity, and transparency, which are the fundamental pillars of corporate governance.[66] It is therefore agreed that the Board of Directors plays a critical role in the success of a company. Taji states that 'it is the board of directors that steers the company and has an overall control of the company.'[67] Therefore, in a nutshell the success or failure of a company is dependent on the board of directors.

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[63] Jeffrey A. Sonnenfeld, 'What Makes Great Boards Great' [2011] <https://hbr.org/2002/09/what-makes-great-boards-great> accessed on 3 May 2019.

[64] Kinyua (n33), 1.

[65] Ibid, 3.

[66] Ibid, 3.

[67] Interview with Taji, Nairobi, Kenya 29 January 2019.

2.3.4 Challenges for the Board

The board is constantly tasked with having to judge, on a case-by-case basis, which stakeholders it treats as 'relevant' at any particular time and which of their interests it is appropriate to meet at that point. Mwanaidi states;

> 'While considering stakeholder interests the board is required to take into account the law, applicable regulations and business concerns. The stakeholders' interests to be considered vary on a case by case basis depending on the issues at hand. For instance when awarding employees a bonus, the bank may also consider the impact on the shareholders.'[68]

In pursuing this important objective, the board encounters uniquely demanding sets of responsibilities and challenges.[69] It also faces a choice of objectives that can at times seem conflicting.

From the fieldwork carried out, the respondents pointed out some dilemmas that the board of directors is constantly facing. The first dilemma is choosing between driving the business forward while keeping it under prudent control. The second dilemma involves the sensitivity to the pressures of short-term gains while take account of broader, long-term trends. The third dilemma is about maintaining a focus on the commercial needs of its business while acting conscientiously towards its employees, business partners and society as a whole.

While considering these dilemmas it is important to note that. An agency relationship exists between the company and each stakeholder. As discussed under the agency theory, a

[68] Mwanaidi (n 62).

[69] Keay (n69).

principal engages another person to act on his or her behalf. Directors therefore act as an agent to the shareholders who are the principal. However, as discussed under the stewardship and ESV theories, the board of directors is not only responsible to the shareholders but to all other stakeholders. Therefore, any misbehavior on the part of the directors is likely to have far-reaching consequences. Given the nature of the relationships, there is likely to be conflicts between the participants in a company.[70] Each board member is expected to be cognizant of these challenges and ensure that they personally contribute towards establishing the right balance between these conflicting forces.

Bahati, while insisting on the need for banks to consider their customers' needs and expectations stated, that;

> 'Where strategic thinking and intentional action towards converting the customer needs into business opportunity are lacking the bank is likely to fail. The banks that fail are often not transformative and do not adapt according to their customer's needs. According to corporate governance guidelines the board should ensure that the company has due regard to rights of stakeholders. Successful companies are the ones that involve stakeholders and give information relating to the company.'[71]

2.4 Causes of Bank Failure despite existence of Regulation

A bank failure often occurs when a bank is not able to meet its obligations to its depositors or other creditors for the reason that it has become insolvent or is too illiquid to meet its obligations.[72] However, in light of the duty to promote the success of the company, a bank

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[70] Kiarie Mwaura, 'Reforming the Duties of Directors under Kenyan Company Law: A Critique'. European Business Law Review 30, no. 4 (2019): 617, 619.

[71] Bahati (n15).

[72] Federal Deposit Insurance Corporation, 'When a Bank Fails - Facts for Depositors, Creditors, and Borrowers', 2008 < fdic.gov/consumers/banking/facts/> accessed on 4 April 2019.

may be considered to fail when it does not consider the matters under section 143 of the Companies Act. Taji notes that;

> 'A bank may be profitable in the short term but it may be funding activities that destroy the environment. Such a company would not be considered successful. Its profitability would be short-lived and it would only be a matter of time before the bank falls out of favour with the community.'[73]

It is possible that some banks succeed yet others fail despite operating in the same environment and adhering to the regulations. This is due to other micro-economic factors, which include: the bank's rigidity to adapt to the changing environment, poor investment decisions, bank runs and the ripple effect and finally non-compliance with regulatory guidelines as discussed below. These factors also give an indication of whether the bank is on the wrong track.

2.4.1 Non-compliance with Regulators' Guidelines/ weak enforcement mechanisms

This study also seeks to establish whether the Success of a bank is dependent on compliance with regulation. In the banking sector, there are the CBK Prudential Guidelines for institutions licensed under the Banking Act. These regulations contain provisions on Board oversight, which the board should pay attention to. The Board is responsible for scrutinizing, ratifying and checking on implementation of the bank's strategy as formulated by management.[74]

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[73] Taji (n67).

[74] Ada Demb and Fred Neubauer, '*The Corporate Board: Confronting the Paradoxes*', (Oxford University Press, New York, 1992) 11.

It is this study's hypothesis that the major building blocks of the success or failure of a bank are dependent on good governance. It is agreed that a bank that embraces sound corporate governance practices is set to succeed in the business that it is involved in.[75] Mwanaidi states that;

> 'Some of the bank failures are perpetrated by practices that reflect bad corporate governance. These include bad financial practices such as creative accounting as the case of imperial bank. a bad corporate governance culture can demoralize the employees which ultimately affects the overall performance of the bank.'[76]

Juma states that;

> 'If strategies are not well-communicated and implemented, the bank will not perform and hence not be profitable and successful. Such compliance with good corporate governance practices will not only lead to long-term success but to sustainability of the bank for generations to come. These banks stand the test of time.'[77]

It may also be argued that the prudential regulations enforced to avoid and/or mitigate the impact of such failures are frequently ineffective and counterproductive.[78] That the poor performance of banking experienced in almost all countries in the last two decades indicates failure arising from regulations and regulators , rather than market failures.

Governance audits are an integral part of ensuring that banks comply with the regulatory requirements. The strength of auditing and reporting principles, competence of board directors, safeguarding of minority shareholders' interests and performance of the bank go

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[75] Fieldwork findings.

[76] Mwanaidi (n 62).

[77] Interview with Juma, Nairobi, Kenya 25 January 2019.

[78] Mark J. Flannery, 'Prudential Regulation for Banks' in Kuniho Sawamoto, Zenta Nakajima, and Hiroo Taguichi, eds., Financial Stability in a Changing Environment. New York: St. Martin's Press 1995, pp. 281-318.

hand in hand.[79] Banks must be conscious of the social, environmental, credit, reputational and compliance risks they may be exposed to.[80] Furthermore, banks operate within a web of complex and competing interests with diverse expectations. This requires striking a balancing between the different expectations and weighing the impact of their decisions on the different stakeholders.[81]

Neema, while referring to a study by the Capital Markets Authority (CMA) remarks that;

> 'if truly committed to compliance with principles of corporate governance, a bank will do well. That Board operations should be carried out in adherence with the CBK Prudential Guidelines, the CMA code of corporate governance and the Companies Act.'[82]

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[79] Boniface Owino, Douglas L. Kivoi, 'Corporate Governance and Bank Performance: A Case of Kenya's Banking Sector', Journal of Research in Humanities and Social Sciences Online Publication Date: August 16, 2016 Volume 1, No. 1, 33.

[80] Jan Willem van Gelder, 'The do's and don'ts of Sustainable Banking: A Bank Track Manual' <www.banktrack.org/.../061129_the_dos_ and_donts_of_sustainablebanking> accessed on 2 November 2018.

[81] A.M.E. Mendoza & C.T. Toralba, 'Shareholder Value and the Common Good,' in D. Lutz & P. Mimbi, The Challenge of Business: Going Beyond Wealth Maximisation and Profit Maximisation, (Law Africa, 2011), pp. 112-114.

[82]Neema (n50); See also Capital Markets Authority, 'Report on the State Of Corporate Governance of Issuers of Securities to the public in Kenya' 2018 <https://cma.or.ke/index.php?option=com_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207> accessed on 3 April 2019.

2.4.2 Failure on the Part of the regulators

CBK's primary duties are set out under the Constitution of Kenya[83] and the CBK Act[84] which duties include licensing and supervision of banks conducting banking business in Kenya pursuant to the Banking Act. In its duties, the CBK has developed Prudential Guidelines for financial institutions carrying out inter alia banking business and other regulated business within the Country.

Banks are able to carry out the regulated banking business only after approval by the CBK. CBK was obliged to consider certain parameters prior to issuing the license. The key considerations being;

1. Satisfying itself as to the professional and moral suitability of persons proposed to manage or control the bank;
2. Certifying that such persons are fit and proper persons to discharge their duties;
3. Satisfying itself as to the financial condition and history of the institution, character of its management, professional and moral suitability of the persons proposed to manage or control the institution, adequacy of its capital structure and earning prospects, the convenience and needs of the area to be served and the public interest which will be served in granting of the license; and
4. Impose such conditions as it deems fit and just on a License issued.[85]

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[83] Article 231 of the Constitution of Kenya.

[84] Sections 4 and 4A of the CBK Act.

[85] *Kimani Waweru & 4 others v Central Bank of Kenya & 7 others* [2018] Eklr

Upon granting a License to a Bank, the CBK is deemed to have conducted an inquiry as to the considerations set out above and more particularly under the Banking Act,[86] and satisfied itself that the Bank had complied with the statutory considerations.[87]

The petitioners in *Kimani Waweru & 4 others v Central Bank of Kenya & 7 others*[88], averred that at all material times, the CBK certified the persons who were in management of the Bank as persons suitable to manage the affairs of the Bank pursuant to section 4, 8, 9A and the First Schedule of the Banking Act. They contended that all the representations by the CBK were that the Bank was under a good financial position and was under good management and that it was not against the public interest for the license to be renewed.[89]

The court observed that it is prudent that a pre-emptive action be taken by the CBK in order to avert a run on the bank. [90]

In any event the CBK has the powers to intervene on the management of a bank should the bank not comply with the requirements set out under the Banking Act.[91] The CBK may do so in various ways including appointing KDIC to assume management and control of the bank.

The KDIC may also on its own initiative request the CBK to carry out inspection of a banking institution, and to avail to the KDIC the information obtained from such

[86] section 4 of the Banking Act, Chapter 488 Laws of Kenya

[87] *Kimani Waweru case* (n 85).

[88] Ibid.

[89] Ibid.

[90] *Supra* (n46).

[91] Section 34 (1) and (2) of the Banking Act, Cap 488, Laws of Kenya.

inspection.[92] Furthermore, the KDIC is empowered to make such inspections as it deems fit.[93]

Juma observes that;

> 'Sometimes enforcement agents are bribed to look the other way. Other times they are discouraged in no unclear terms from investigating certain directors and taking any resultant action. There is a lot of intimidation'[94]

It may be deduced from this statement that, as much as there may be weaknesses in the enforcement mechanisms, sometimes there might be interference from undisclosed sources.

2.4.3 Bank Runs (BR) and the Ripple Effect

Perhaps the main reason against letting banks fail is that such failures may result in bank runs (BRs). When they occur BRs lead to socially disruptive waves of bank failures.[95] Considering the objects and functions of the CBK and the precarious nature of the banking industry, courts have observed that it is prudent that CBK do take a pre-emptive action in order to avert a run on the bank and that any challenge to the decision taken by the CBK be taken thereafter.[96] Therefore placing a bank under receivership may end up saving the particular bank but cause a BR on the rest.

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[92] Section 38 of the Kenya Deposit Insurance Act No. 12 of 2012, Laws of Kenya.

[93] Ibid, Section 39.

[94] Juma (n77).

[95] Helen A. Garten, 'Banking On the Market: Relying On Depositors to Control Bank Risks' 4 Yale J. on Reg. (1986). 129, 160-63 (1986) (arguing that individual bank failures will lead to economically disruptive bank runs)

[96] *Supra* (n46).

Banks as financial intermediaries, usually have a greater percentage of their liabilities (deposits) held in deposit accounts, in a form that can be withdrawn at any point. Their assets (loans) on the other hand are in comparatively illiquid mortgages and commercial loans that are to be repaid in a period of years.[97] Because of this unevenness in structure concerning the maturity of assets and liabilities, no bank would be in a position to pay off all its depositors instantly. In the event that a good percentage of the depositors unexpectedly demanded their funds, the bank would face a severe liquidity crisis.[98] It would even be forced to sell assets in order to meet the unexpected withdrawals; if the bank is unable to sell the quickly enough, the bank would have to close until it is in a position to obtain the appropriate liquidity threshold. It would be catastrophic, if in the rush to obtain the required liquidity the bank sells off assets at throw away prices or calls in profitable loans. The value of the entire bank would be proportionately reduced.[99]

If a BR occurs on a single bank, it can ripple onto the entire banking system. Depositors would see other depositors in another bank rushing to take out their funds, and rush to their banks to do the same. This can be worsened if depositors see the other bank shutting its doors rather than paying out. They might quickly and even irrationally conclude that their

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[97] Douglas W. Diamond & Philip H. Dybvig, (1983) "Bank Runs, Deposit Insurance, and Liquidity," Journal of Political Economy, University of Chicago Press, vol. 91(3), pages 401, 418.

[98] Jonathan Macey and Geoffrey Miller, 'Bank Failures, Risk Monitoring and the Market for Bank Control' (1988) Faculty Scholarship Series, Paper 1741.

[99] Ibid.

own bank is susceptible to the same outcome.[100] This is what happens in a bank run[101] – as it happened with Chase Bank after the collapse of Imperial Bank.[102] Juma states that;

> 'I was involved in the investigation of chase bank. As much as there were unsound practices, the main issue that brought chase to its knees was the collapse of Imperial. Depositors panicked especially when they got wind of the ongoing investigations of Chase. A lot of banks experienced BR's but some were able to weather the storm. '[103]

In part, bank failures are viewed to be more damaging than other company failures because they are perceived to spread in a domino fashion throughout the banking system, felling stable as well as unstable banks. Thus, the failure of an individual bank introduces the possibility of system wide failures.[104] When one bank fails, it is more likely that other banks too will be shaken.[105] The 2015-2016 wave of troubled banks spread from one bank to another, like a wild fire. The crisis did not just affect banking but also created chaos on the rest of the economy. As a result, bank failures have been and continue to be a major public policy concern in all countries and a major reason that banks are regulated more rigorously than other firms are.[106]

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[100] Macey and Miller (n9898).

[101] A Bank Run (BR) is a situation where depositors withdraw their deposits from banks for fear of the safety of their deposits. A BR is a prominent feature of any banking system.

[102] Ishmael Maingi, 'Understanding bank runs: The case of troubled Chase Bank' <https://www.ksg.ac.ke/index.php?option=com_content&view=article&id=406:understanding-bank-runs-the-case-of-troubled-chase-bank&catid=97&Itemid=806> accessed on 4 April 2019.

[103] Juma (n77).

[104] Elroy Dimson and Paul Marsh, *The Debate on International Capital Requirements* (London: London Business School 1994) 65.

[105] Ibid.

[106] Gerald Corrigan, "The Banking-Commerce Controversy Revisited," (1991) Quarterly Review, Spring. (Federal Reserve Bank of New York), pp.1, 13.

2.5 Conclusion

This study has established that the success of a company means that a company is not only running a profitable business for its shareholders but takes care of all stakeholders in accordance with the stewardship theory. Success involves having a positive impact in society. It involves conducting business with honesty and integrity. Obviously, for the success to be achieved, leadership is crucial. As such, the directors should ensure the long-term consequences of their decisions and the sustainability of the bank. Sometimes it may be difficult to tell where the bank is headed without insider information, as pointed out by Sam. He gives an example of chase bank and explains that nobody saw the bank going down.

Having looked at the reasons given by the respondents for the high level of scrutiny over banks, yet they are companies just like any other, this research is unable to identify a sound reason for the enhanced regulation. It would be expected that following bank failures, the regulators should focus on where they as the watchdog failed. However, the regulators normal response is usually introduction of more stringent regulation and draconian fines and penalties.

The board of directors plays an important role towards market credibility of the bank.[107]It does so by ensuring regulatory compliance and sound internal policies and processed. The board's composition is also very critical. By incorporating diversity in its membership and skills sets ensures the board is likely to have a broader view of the business and stakeholders' confidence is enhanced.[108] The directors need to continually engage

[107] Bahati (n15).

[108] Ibid.

stakeholders and implement stakeholder feedback. They also need to ensure enhanced transparency and disclosure standards.[109] Asha points out that directors who are well accredited give the shareholders confidence with the bank.

In models where directors' salaries and bonuses are pegged on long-term sustainability as opposed to short-term profitability, the bank is likely to do well.[110] A substantial number of companies have recently installed employee share ownership plans (ESOPs) particularly for the executive directors.[111] When directors of a bank have an ESOP, it is an added incentive to ensure that the bank succeeds, even for their own good.

Good corporate governance results in stability, confidence and performance.[112] Good governance practices like transparency, stakeholder engagement, social responsibility, accountability and board commitment reinforce the bank's profitability, growth and success as they strengthen the bank's relationship with its clients, shareholders, stakeholders, regulators and the society generally.[113]

Finally, thus chapter has established that some banks still fail despite the existence of regulation. The failure is largely attributed to non-compliance of the regulations due weaknesses in the enforcement. This study will now look at enforcement of the duty to promote the success of a bank in the next chapter.

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[109] Bahati (n15).

[110] Ibid.

[111] Neema (n50); An ESOP is a share incentive program offered by companies to their employees allowing them to acquire shares in the company.

[112] Ibid.

[113] Ibid

'A duty is only as useful in law as it is enforceable.'[1]

CHAPTER THREE: ENFORCEMENT OF THE DUTY TO PROMOTE SUCCESS OF A BANK

3.0 Introduction

The failure of banks highlights the gap that remains between corporate governance principles and corporate governance as implemented and practiced, despite existence of corporate governance principles, legal frameworks, codes and standards.[2] The OECD (Organisation for Economic Co-operation and Development)[3] concluded that financial crisis to a large extent could be attributed to failures and weaknesses in corporate governance regulations.[4]

It cannot strictly be argued that bank failure is solely attributable to leniency in the law. The law is very clear but the weakness lies in enforcement.[5] Juma observes that;

> 'despite investigations on the directors of the failed banks being done diligently, sometimes no action is taken to charge the directors due to corruption. That the

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[1] Interview with Zuri, Nairobi, Kenya 12 June 2019.

[2] International Finance Corporation, 'From Companies to Markets - Global Developments in Corporate Governance' (2016) <https://www.ifc.org/wps/wcm/connect/5a764bef-bd5f-4b52-9d34-2eabde03e6f0/From-Companies-to-Markets%E2%80%94Global-Developments-in-Corporate-Governance-April-2016.pdf?MOD=AJPERES&CVID=liCJzzq> accessed on 3 February 2019.

[3] The Organisation for Economic Co-operation and Development is an intergovernmental economic organisation with 36 member countries. It was founded in 1961 to stimulate world trade and economic progress. <https://en.wikipedia.org/wiki/OECD> accessed on 24th April 2019.

[4] Grant Kirkpatrick, 'The Corporate Governance lessons from the financial crisis' (2009) Financial Market Trends vol.2009/1. Paris: OECD.

[5] Interview with Bahati, Nairobi, Kenya 25 February 2019.

> perpetrators of bank failures still walk scot free. Due to their social standing directors are often perceived to be above the law.'[6]

According to Bahati,

> 'A successful bank is one that has a proper strategy in place and has proper policies and controls for running its business. It is imperative for any successful bank to adhere to these controls. However, formulation of strategy, policies and guidelines and controls may not be sufficient to ensure the success of a bank. There is need for external controls that are effectively enforced. As evidence by the recent crises, it is apparent that regulatory forces may not be as effective as intended in promoting a safe and fair allocation of bank resources.' [7]

The law may be lenient to an extent but some respondents believe that the law is sufficient but enforcement remains the challenge.[8] The perpetrators of bank failures still walk scot free. Due to their social standing directors are often perceived to be above the law.

3.1 Elements of Enforcement

The first thing to note is that s.143(1) states that directors owe their duties to the company. The question that arises then is that if that is the case, how does that augur with the directors duty to promote the success of the company for the benefit of the members as a whole?[9] This is a matter of interpretation.

This study now delves into assessing how the duty to promote the success of the bank is likely to be interpreted by the courts, while enforcing the duty. Neema states that;

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[6] Interview with Juma, Nairobi, Kenya 25 January 2019.

[7] Bahati (n5).

[8] Fieldwork finding.

[9] Andrew Keay, 'Ascertaining the corporate objective: An entity maximisation and sustainability model' (2008) Modern Law Review 71(5), 663, 671.

> 'One of the stumbling blocks to enforcement is the interpretation of the duty by the courts. Interpretation of concepts like good faith and success of the company become largely subjective and do not always lead to predictability.[10]

Balancing between promoting the company and interests of the members is a tough balancing Act. This implies that to some degree, the interpretation and application of the law is ambiguous. Considering the law has been in force for almost four years, it is surprising that there is still not clear how these new and ambiguous concepts are to be interpreted. Relevant case law is also scarce making it difficult to establish how s.143 would be interpreted by the courts.

3.2 Codification of the Duty to Promote Success of a Company

It is felt that the Codification of the duty to promote the success of the bank may not be sufficient to enforce the duty or it may be too soon to tell.[11] The Kenyan banking environment may not necessarily be unique but it is different from the UK where the companies act was transplanted from and this affects how its effectiveness within the Kenyan context.[12] In *Nyali Ltd V Attorney-General*[13] Lord Denning observed that just like an English oak, laws cannot be transplanted into the African jurisdiction and be expected to do as well. If fact, Taji comments that;

> 'Kenyan banks are smaller and not big enough to carry the structures under the guidelines. Furthermore, Kenya is not as free in doing business of banking as the UK. The Kenyan Government may also be accused of implementing laws that are against free market. An example is the capping of interest rates that banks are allowed to charge by the regulator, which may be against free market practices regulator setting the CBR Rate. The Board and management therefore do not have

[10] Interview with Neema, Nairobi, Kenya 14 December 2018.

[11] Fieldwork findings.

[12] Fieldwork findings.

[13] *Nyali Ltd V Attorney-General*, [1956] 1 QB 1.

the autonomy in setting their prices. The regulations governing the banking industry are often borrowed from international laws such as FATF.'[14]

The current position insofar as the duties of directors in Kenya are concerned is that the law has changed, essentially. For a long time, directors' duties were only provided for by common law rules and equitable principles. Kenya, like other common law jurisdictions, has now entrenched the duties into statute, Companies Act. Particular to this study is Section 143 of the Act. This duty, which became operational on 6th December 2018 will now guide directors in their oversight activities and will be used to determine whether directors have acted appropriately or not in promoting the success of the company. One important thing to emphasize is that although Section 143 of the Act was conceived and enacted even before the financial problems causing banking crisis developed, at least publicly, it was put in force after the challenges causing the crisis started to unfold.[15] It is therefore arguable that the codification does not do much to prevent bank failures.

While Section 143 is viewed as imposing a new duty on directors, it is evident from previous case law that the directors have had a similar duty in the past. In *Aberdeen Railway Co. v Blaikie Brothers*,[16] Lord Cranworth observed that a company can only act by agents, and it is obviously the duty of those agents so to act as best to promote the interests of the corporation as those whose affairs they are conducting. Similarly in *Scottish Co-operative Wholesale Society Ltd v Meyer*, Lord Denning said that the duty of directors ―was to do

[14] Interview with Taji, Nairobi, Kenya 29 January 2019.

[15] Ibid.

[16] *Aberdeen Railway Co v Blaikie Brothers* 1854 UKHL 1

their best to promote its business and to act with complete good faith towards it. Therefore, it seems, that directors have always been under a duty to promote the company's business.

Nevertheless, a combination of legislation, regulation, effective risk management and appropriate sanctions are needed, if unethical behaviour resulting in corporate failure, is to be prevented in future.[17] Largely, codification of the duty to promote the success of a company has helped reduce incidences of bank failure. Directors are now aware that someone is monitoring them and they need to do things the proper way. Laws regulations and codes provide guidance for boardroom conduct.[18] Nevertheless, it is upon the individual directors and all directors collectively to contribute toward the proper functioning of the board and discharging their duty to promote the success of the company.[19] Codification of the duty brings about a degree of clarity, certainty and predictability.[20] The directors are made aware of the repercussions of their actions or in actions and consequences thereof. Corporate governance codes often give a high degree of flexibility since companies are allowed to comply or explain.[21]

Before 2015, the law was lenient. The Companies Act now introduces reforms by bringing clarity on matters to do with duties of directors, actions to be taken and penalties to be imposed against them for non-compliance. The sanctions now include personal liability for fines and criminal sanctions. However, they are not being strictly imposed and if imposed,

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[17] Lynn T. Drennan, 'Ethics, Governance and Risk Management: Lessons From Mirror Group Newspapers and Barings Bank' [2004] Journal of Business Ethics, Volume 52, 3, 257.

[18] International Finance Corporation (n2).

[19] Ibid.

[20] Interview with Mwanaidi, Nairobi, Kenya 13 February 2019.

[21] International Finance Corporation (n2).

the penalties are too lenient.[22] The companies act is a start. The regulator needs to be keen on enforcement, CBK, CMA.

The Capital Markets Act, mainly regulates public listed companies and was enacted and revised in 2002 to primarily establish the Capital Markets Authority (CMA), which is the oversight authority for securities in Kenya. The CMA has developed corporate governance guidelines for companies listed with the NSE with the aim of upholding investor confidence in Kenya.[23]

This has since been rectified and the Companies Act now provides for personal liability on the form of fines, criminal sanctions and in the event that a company is solvent, the potential to be disqualified as a director for up to fifteen years.

The purpose behind section 143, was mainly to reign on directors who single mindedly focus on profits. It was to emphasize the fact that directors should run the company while taking into account long-term value of their decisions and actions. Stringent regulation if not checked can drive banks out of business or make it difficult to thrive.[24] Directors should be able to work with minimum supervision since they are deemed to be fit and proper for the job.[25]

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[22] Juma (n6).

[23] The Capital Markets Authority Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya were issued vide Gazette Notice No 3362 and were developed by the Capital Markets Authority primarily for public listed companies in Kenya accessed 20 April 2019.

[24] Mwanaidi (n20).

[25] Interview with Asha, Nairobi, Kenya 27 February 2019.

It is opined that too much pressure on the directors may be detrimental if not checked.[26] It may end up promoting a short-term view of the business thus endorsing bad decisions just to register a profit. Taji is quick to point out that it is actually management that does most of the hard work.[27] As such, the board is actually the one that exerts pressure on the management. Nevertheless, the board needs to be very tactful and organized in delegation. Bahati is quick to point out that pressure is not always negative. If the pressure is aligned with meeting the bank's strategic objectives, it is not bad.[28] In fact, Bahati opines that pressure is not necessarily a bad thing as some director's end up performing better since they know that at the end of the day they shall be held accountable.[29]

Mambo opines that while it is good to have guidelines, it is not true that stringent regulation directly translates to the success of a bank.[30] That too much regulation will stifle the business of the bank. Regulations such as the requirement on depositors disclosing the source of funds may discourage deposit mobilization by banks leading to a breach in the liquidity ratios as required by the CBK. He further points out that the law on Interest rate capping goes against the principles of capitalism as it is a law only affecting the pricing of banking products yet other businesses operate without such restrictions.[31]

Mambo supports his views by giving an example of the Corporate Governance Code, which requires companies to apply or explain, is good. Where a bank is unable to comply

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[26] Mwanaidi (n20).

[27] Taji (n14).

[28] Bahati (n5).

[29] Ibid.

[30] Interview with Mambo Nairobi, Kenya 19th June 2019.

[31] Ibid.

with the code, an explanation giving reasons would suffice.[32] He further explains that the CBK Prudential Guidelines for banks outline the best practices and are not necessarily mandatory. However all these regulations end up being nuisance.[33] Some regulations stifle business and are onerous on the part of the bank. For instance, the proposed board structures with different committees and the monthly reporting with checklists.

Banks should be regulated but not over-regulated.[34] Too much regulation may hinder innovation, creativity and agility to implement new ideas.[35] For every innovative product that the banks come up with, they must seek approval from the regulators. As such, some ideas never materialize and there is need for balance.

It may also be argued that despite the stringent regulations, banks should be able to implement a strategy that is in line with the regulations.[36] Regulations whether stringent or not need to be considered and complied with. It is opined that policy formulation and regulation should be done in consultation with the stakeholders.[37]

3.2.1 Good Faith

This study identified glaring gaps in the literature review with regards to definition of the term good faith.[38] The study therefore sought to attempt a definition from the fieldwork.

According to Mwanaidi;

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[32] Ibid.

[33] Ibid.

[34] Mwanaidi (n20).

[35] Ibid.

[36] Asha (n25).

[37] Ibid.

[38] See also Loise Musikali, 'The Law affecting Corporate Governance in Kenya: A need for Review' (2008) Vol. 19 No. 7 ICCLR 213, 213.

> 'An action would be in good faith if there is no self-interest, the director has sufficiently interrogated the issue and sought all the relevant information and if necessary, expert advice.[39]

Juma notes that;

> 'For a director's action to be in good faith, it should be well thought out. A bank's directors should base their actions on the mission and vision of the bank for the action to qualify to be in good faith. The outcome of the directors' actions is what determines whether the action was in good faith or not. If the actions of the bank's directors lead to its collapse, the actions were definitely not in good faith and such a director has definitely breached his duty to promote the success of the company.'[40]

Taji on the other hand states that;

> 'A decision of a director can lead to the failure of a company but such a director shouldn't be punished if he actually believed that the action would benefit the bank. If such directors are punished, it would deter them from taking any risk even if it would benefit the company.'[41]

According to Bahati;

> 'a director of a bank is required to understand the business that the bank is engaged in and apply his or her mind to ensure that the bank achieves its strategic objectives while being cognizant of the legal and regulatory requirements. A director of a bank may not be considered to have acted in good faith if a decision he made was contrary to the internal policies and procedures of the bank.[42]

Asha observes that

> 'for a director to be considered acting in good faith, he should desire and intend to ensure that the company succeeds. More than anything, a director should want to see the company flourishing and put aside his personal desires. Good faith should reflect actions of selflessness.'

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[39] Mwanaidi (n20).

[40] Juma (n6).

[41]Taji (n14).

[42] Asha (n25).

Nevertheless, courts would not blindly accept a director's defense that he or she acted in good faith, where it is apparent that the decision complained of led to a significant disadvantage to the company. In such a case a director would, according to Jonathan Parker J in *Regentcrest plc v Cohen*, have a challenging task of persuading the court that he or she honestly believed that the action was in the best interests of the company.[43] But it is likely to be challenging to prove, save for cases of gross behaviour, that the directors have undoubtedly breached their duty of good faith.[44] It is an uphill task, in most cases, to question the actions of someone who is able to clearly explain that what he or she did was done in the belief that it was done was in the company's best interest. Directors will usually insist that their intentions were clean. In that case courts would be somewhat reluctant to reject such evidence given by directors about their intentions.[45]

3.2.2 Interest of the Company versus interest of the members

It is important to note that s.143 (1) provides that directors owe their duties to the company but also for the benefit of the members as a whole.[46] This may mean that companies are ultimately to be run for the benefit of their shareholders?[47] It must therefore mean that the directors' overall duty is to the company.

[43] *Regentcrest plc v Cohen* [2002] 2 BCLC 80 at [90]. Also, see Arden LJ in Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244; [2005] 2 BCLC 91 at [52].

[44] *Re Smith & Fawcett Ltd* [1942] Ch. 304.

[45] Paul Davies, *Gower and Davies' Principles of Company Law*, 8th ed (Sweet and Maxwell, London, 2008) at 510.

[46] See also the Kenyan constitution; article 20 imposes an obligation on all persons, including corporations, to respect the environment, the community and human rights.

[47] Rachel C. Tate, 'Section 172 CA 2006: the ticket to stakeholder value or simply tokenism?' < https://www.abdn.ac.uk/law/documents/Section172CA2006-theticket tostakeholdervalueorsimplytokenism.pdf> accessed 23 August 2019

Should a conflict arise between the company's interests and those of the members, which interests should prevail? It is argued that the company's interests come first and should prevail provided that an action is not prejudicial to the interests of the members. Section 143 (2) means that directors have one main duty - to act in such a way that will promote the interests of the members as a whole. Except for derivative actions[48], the law does not give the shareholders right to enforce the duty since the duty is owed to the company. This has always been the case, save where the courts wish to apply one or more of the exceptions to the rule laid down in *Foss v Harbottle*.[49]

In discharging the duty, directors are required to 'have regard' to a non-exhaustive list of factors. Among these factors are: long-term consequences; employee interests; the need to foster relationships with customers and suppliers; and any impact that their decision might have on the community or environment.[50] Promotion of members' interests is unlikely to be achieved if management conduct business without regard to employees, suppliers and

[48] See section 238 of the Companies Act; A derivative action is defined as a claim brought by an individual shareholder, acting on behalf of and for the benefit of a company, against the directors of the company. The derivative action is brought to remedy wrongs committed against the company, which the company is not willing to pursue itself.

[49] *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.; The *Foss v Harbottle* rule reflects the principle that where damage is done to the company itself, it is the company that should bring any claim. However important exceptions to this rule have been developed. Amongst these is the 'derivative action', which allows a minority shareholder to bring a claim on behalf of the company in situations of 'wrongdoer control'. See also Kiarie Mwaura. 'Reforming the Duties of Directors under Kenyan Company Law: A Critique'. European Business Law Review 30, no. 4 (2019): 617, 627. Kiarie discusses the case of *Musa Misango v. Eria Musigire & Others* [1966] EA 390, which laid down exceptions to the majority rule in line with *Foss v Harbottle.*

[50] Companies Act, Section

the community in which it is situated; and without fostering relationships with these stakeholders.[51] This encourages success of a company in the long-term.

However a Director will not be expected to consider these factors beyond the point at which such considerations are likely to conflict with the primary duty to promote the success of the company.[52] Stakeholder interests have not be considered independently and there is no separate duty or accountability is owed to the stakeholders.[53]

While dealing with the duty to act *bona fide,* Jonathan Parker J, in *Regentcrest plc v Cohen*[54] stated that in instances where the directors tender undisputable evidence that they had honestly believed that they had acted in the best interests of the company, and if that evidence were accepted, then in such an instance there would not be a breach. The codified duty seems to take the same approach.

Nevertheless, there is one situation where reasonableness might be an issue. This is where the director essentially fails to ultimately consider whether his or her actions would be in the interests of the company. In *Charter bridge Corp Ltd v Lloyds Bank Ltd*[55] Pennycuick J said that;

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[51] Rachel C. Tate (n 47).

[52] Ibid.

[53] Andrew Keay, 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value and All That: Much Ado About Little?' (2010) SSRN Electronic Journal, 30 < https://www.researchgate.net/publication/228273065_Moving_Towards_Stakeholderism_Constituency_Statutes_Enlightened_Shareholder_Value_and_All_That_Much_Ado_About_Little/citation/download> accessed on 11th December 2018.

[54] *Regentcrest plc v Cohen* [2001] BCC 494 (Ch).

[55] *Charter bridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62; [1969] 3 All ER 1185.

> ‘in such a situation the court has to ask whether an intelligent and honest man in the position of a director of the company involved, could, in the whole of the circumstances, have reasonably believed that the transaction was for the benefit of the company.’[56]

In summary, the position under the common law duty was that as long as the courts believed directors while they gave evidence and were convinced that the directors indeed considered their decision in good faith and acted in the best interests of the company, the directors would not be held liable for such breach. However, a judge might, upon considering the evidence adduced, decide that the directors are not to be believed and actually hold them liable. If a director’s action is in good faith, though unreasonable according to the courts, then it would appear that the director would not be in breach of the duty, provided that he or she had considered that what they were doing was in the best interests of the company. There is not much to suggest that the duty as codified will be interpreted any differently.

Shareholders have been empowered to institute derivative action against directors who are believed to be in breach of the duty. However, they are required to obtain the court‘s permission to continue such proceedings.[57] Considering the reported decisions under the new regime, where shareholders have sought permission/leave to continue derivative actions against directors, it is evident that shareholders have largely found it difficult,[58] although the time in which the provisions have been in force is rather short. Important to

[56] Ibid, 1194.

[57] Companies Act, Laws of Kenya, section 239

[58] Andrew Keay and J. Loughrey, Derivative Proceedings in a Brave New World for Company Management and Shareholders [2010] JBL 151.

note too is the cost element that any prospective litigant would have to bear and this factor might be discouraging.

In addition to derivative actions, shareholders might also invoke s.780 of the Act.[59] While doing so, the shareholders argument should be that the director‘s conduct of breaching s.143 among other provisions, constitutes conduct that is unfairly prejudicial to them. Notably, while s.780 is able to be employed by a shareholder, it hardly is.[60]

As far as banks are concerned Bruner observes that even when given opportunities, shareholders are unlikely to take legal action against directors, which then works against the governance of such companies.[61] Without any action by shareholders and in the absence of a decision by the board to initiate proceedings against irresponsible directors, there is likely most likely not going to be any proceedings.[62]

Board evaluation has become a more widespread practice with some countries further mandating an external independent board evaluation every three years.[63] Board evaluation can be a sensitive issue to some people and it is important to be cognizant of this possibility on order to deal with and address the sensitivities. Neema observes that

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[59] This provision empowers shareholders to institute proceedings in the event the affairs of the company have been carried out in an unfairly prejudicial way.

[60] Andrew Keay, ‘Company Directors Behaving Poorly: Disciplinary Options for Shareholders’ [2007] JBL 656 at 678, 679.

[61] Christopher M. Bruner, ‘Corporate Governance Reform in a Time of Crisis’, (2011) 36 J. Corp. L. 309, 310.

[62] Ibid, 310.

[63] International Finance Corporation (n2).

> ‘directors’ performance is often reviewed collectively. It may not be advisable to review the same individually except in the case of malpractice. Individual review may create bad blood.’[64]

However, Juma categorically supports individual review and states;

> ‘I advocate for individual review of all directors including background checks, wealth declarations. This should be done annually and shared with the shareholders at the AGM. The AGM should then vote on the directors to retain based on the outcome of such a review.’[65]

Taji states that;

> ‘that board evaluations should be done both individually and as a group. Governance audits are also an important evaluation tool. Mwongozo gives a lot of guidance on how such reviews should be conducted.[66]

Bahati advocates for a scorecard for each director. He observes that

> ‘the scorecard should be able to measure the number of meetings attended, evaluate the ideas brought on board, accounts approved among other parameters. The scorecard should be made available for the shareholders to scrutinize.[67]

Some respondents from the fieldwork were of the opinion that more needs to be done.[68] the success of the strategy ratified by the board should be evaluated regularly and in line with compliance of the policies and procedures of the bank.[69] Minority shareholders are also not completely empowered and their powers should be enhanced further.[70] They are

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[64] Interview with Neema, Nairobi, Kenya 14 December 2018.

[65] Juma (n6).

[66] Taji (n14).

[67] Bahati (n5).

[68] Fieldwork findings.

[69] Ibid.

[70] Ibid.

often overlooked. That Companies' Act now provides for derivative action[71] but does not sufficiently empower the minority shareholders to bring a suit on behalf of the company even if it is in the best interest of the company. That in addition to this provision it is important to adopt best practices from other countries like having an independent director representing the minority shareholders.[72]

If Section 143 is to be advocated as advancing the position of stakeholders in any way, enforcement thereof becomes greatly significant. A derivative claim may be brought by a shareholder in respect of breach of duty by a director. However, even if stakeholders other than shareholders believe that directors have breached s143, they cannot bring legal action to enforce this duty.[73] This is simply because the duty is owed to the company. Consequently, only shareholders, are entitled to bring derivative proceedings on the company's behalf in certain circumstances. Stakeholders are, therefore, dependent on shareholders to challenge non-compliance.

A number of obstacles exist to potentially discourage a shareholder from mounting proceedings and so from pursuing stakeholder interests. These include the length and complexity of the process itself. Claimants must first establish that there is a prima facie case.[74] If accepted, the claim proceeds to a full hearing for permission to take a derivative claim. Section 241(1) sets out circumstances in which the court must dismiss an application, with s241 (2) listing six factors that the court is to consider when determining

[71] See section 238 of the Companies Act.

[72] Bahati (n5).

[73] Andrew Keay, 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' (2007) 28 Co Law 4 106, 109.

[74] Companies Act Section 238

whether an application should succeed. The novelty is that it places the decision of whether commencing litigation is in the interests of the company with the court. It is at this second stage that most claims will likely fail due to the breadth of this discretion.[75] it will be hard to avoid the second stage turning into a mini-trial and so unduly lengthening preliminary proceedings. Finally, the claim when framed, is still framed in a manner which favours management, however permissive its terms might appear.[76]

In the case of *Ghelani Metals Limited & 3 Others Vs Elesh Ghelani Natwarlal & Another*[77] Onguto J. stated that;

> Derivative actions are the pillars of corporate litigation. As I understand it, a derivative action is a mechanism which allows shareholder(s) to litigate on behalf of the corporation often against an insider (whether a director, majority shareholder or other officer) or a third party, whose action has allegedly injured the corporation. The action is designed as a tool of accountability to ensure redress is obtained against all wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the corporation.

With the guidance of Onguto J., Gikonyo J. in the case of *Udali Group Limted v Umberto Riccardo Dellavale & 3 others*[78] considered that the matter was a derivative action. He stated that;

> It is clear that these shareholders and directors are strangling the 4th Defendant due to their disagreements. It seems from the proceedings and orders already obtained from courts, that the 4th Defendant's (company's) business and operations have been stalled; equipment are stalled. Nonetheless, there are pertinent issues raised in these proceedings on the operations of the company by some of the shareholders and their directors, whose resolution should benefit the company. Accordingly, I declare these to be derivative proceedings and hereby grant the Plaintiff to continue with them as such.

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[75] Alan Dignam and John Lowry, '*Company Law'* (5th edn, OUP 2009) 190.

[76] Davies (n45).

[77] *Ghelani Metals Limited & 3 Others Vs Elesh Ghelani Natwarlal & Another* [2017] Eklr

[78] *Udali Group Limted v Umberto Riccardo Dellavale & 3 others* [2017] eKLR

As was intended, derivative claims continue to be subject to 'tight judicial control'. They remain a 'weapon of last resort'.[79]

3.2.3 Success

It was noted from the literature review that the term success in context of the duty was also uncertain. Exactly what will promote company success and, indeed, what constitutes 'success', are also matters for the director's own judgment.[80] It is not clear whether success refers to profit or perpetuity of the company?[81]

There is also no requirement to guarantee success. In response to any claim, directors will inevitably contend that they did have regard to the relevant constituencies and simply believed that the action taken promoted the company's success for its members' benefit.[82] If so, it will be strenuous to successfully assert otherwise.

Interpretation and application of the duty generally are also somewhat problematic given that core terms are not clearly defined. Again, the consensus appears to be that the operation of the individual components of s143 is to be left to directors and their good faith judgment.[83] Furthermore, s143 explicitly suggests a highly subjective compliance test – requiring a director to act in the way 'he regards' to be most likely to promote company success. As a consequence, there is no definite standard against which to judge any given

[79] David Gibbs, 'Has the statutory derivative claim fulfilled its objectives? The hypothetical director and CSR: Part 2' (2011) 32 Co Law 3 76, 82.

[80] Davies (n45).

[81] Keay (n69).

[82] Ibid.

[83] Keay (n73).

action. Taken as a whole, it is difficult to anticipate situations in which directors will be held in breach of this obligation.[84]

For most commercial companies, long-term value creation is their strategic goal. However, value creation and the success of the company needs to be considered in each company's particular context. For some companies, short-term measures or goals may be their priority.

It is important to note that members usually have divergent views.[85] In addition, the question may arise: for whom is this success? Section 143 (1) states: 'for the benefit of its members as a whole'. Still, this is does not give a clear position since a company being a legal entity is separate from its shareholders.

Nevertheless, in a nutshell success means the achievement of the goals that the members collectively commend.[86] For a bank, success may mean long-term increase in asset value and stability. Although, it has been argued that what members prefer may differ from one group of stakeholders to another, some stakeholders may only be interested in return on investment.[87]

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Sarah Kiarie, 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: Which road should the united kingdom take? (2006) International Company and Commercial Law Review, 17(11), 329,340.

85 Brenda Hannigan et. al, '*The Companies Act 2006 – Commentary'* (Butterworths, UK: LexisNexis, 2009).

86 Luca Cerioni, 'The Success of the Company in section 172(1) of the UK Companies Act 2006: Towards an 'Enlightened Directors' Primacy?' (2008). Original Law Review, 4(1), 2, 29.

87 Ibid, 30.

3.3 Role of Directors in Enforcement of the Duty

In the case of *J.S.K (Cargo) Ltd v Kenya Airways Ltd*[88] the Court held that a Managing Director is the principal officer of a corporation who may speak on behalf of the corporation and who is permitted by law to act for the corporation in legal proceedings. This shows that directors occupy a very fundamental position in the company and their actions and/or inactions determine the success or failure of the company.

Making of decisions involves both judgment and process: directors should aim to have suitable processes in place for the bank.[89] Banking business is largely conducted through procedure manuals and policies that are duly approved by the board of directors. So that in taking decisions to promote the success of the company, the directors must have considered one way or another the long-term consequences and the wider stakeholder considerations.[90]

According to Busara, a judge,

> 'It is not the directors' job to balance the interests of the company and those of other stakeholders. Instead, after weighing up all the relevant factors, directors should make a decision. The decision should be bases on which course of action they consider as best leading to the success of the company, having regard to the long term.[91]

This can sometimes mean that certain stakeholders are adversely affected, but this does not call into question decisions made.[92]

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[88] *JSK (Cargo) Ltd v Kenya Airways Ltd* [2008] eKLR

[89] Interview with Neema, Nairobi, Kenya 14 December 2018.

[90] Interview with Kilinda, Nairobi, Kenya 18 June 2019.

[91] Interview with Busara, Nairobi, Kenya 10 June 2019.

[92] DC100, 'Guidance on Directors' Duties: Section 172 And Stakeholder Considerations' (2018) < https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I59d0a3ddd47f11e8a5b3e3d9e23d7429.pdf?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 16 May 2019.

During the literature review, thus study noted that placing the huge burden of the duty on the directors may be unfair. This is because directors' are not involved in the daily decision making of the bank's operations.

Shani states that;

> 'A director's role in ensuring success of a bank largely involves receiving and considering reports or information, debating and sharing views on strategy, policies or on judgments about specific challenges and opportunities. The board needs to delegate to and empower management teams and employees to carry on businesses day to day. In so doing, the Board needs to prioritize its time and use proper judgment. [93]

The study therefore sought ways in which the directors burden can be lightened while keeping them accountable. This section of the study examines how this can be achieved. The specific areas of focus for directors are discussed below in detail.

3.3.1 Strategy that Reflects the Spirit of Section 143

While setting the bank's strategy, and considering risk issues, bank directors should think about their overall duties, their stakeholder and other factors that will contribute to the company's success or will be affected by its activities.

On the factors to consider while formulating the bank's strategy, Tambo states that,

> 'it is paramount that directors consider how to assess any third parties with whom the company deals and the appropriate engagement with such stakeholders. In so doing, the directors need to consider the relationship between the company's visions and goals and its strategy to achieve those visions and goals along with the stakeholder interests. Banks depend on their customers, their employees and their suppliers. It is important that these interrelationships are recognized explicitly in the strategy of the company.'[94]

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[93] Interview with Shani, Nairobi, Kenya 18 June 2019; see also Anand (n55).

[94] Interview with Tambo, Nairobi, Kenya 18 March 2019

Mambo notes that;

> ‘where a company’s strategy, corporate vision and goals reflect stakeholder interests and these interests are appropriately and proportionately monitored and reinforced in the company’s activities, then the company is set to succeed. it is easy for directors to find themselves drawn into prioritizing immediate and urgent issues, at the expense of the longer term issues. As such directors need to avoid this trap and consider the extent to which the ongoing actions and sustained success of the company’s business, will pan out in the long-term including its impact on the communities and environment in which it operates, as well as its reputation. Should such actions be considered important in the long term, then they should be allocated sufficient time and focus by the board and management.[95]

Therefore, for directors to succeed, the should put in place a strategy that considers the duty to promote the success of the bank. They can then delegate the implementation to the management. They will then be left with the role of monitoring. As such in the day to day decision making, the management should consider the strategy of the bank.

3.3.2 Training

This study opines that, in order to discharge the duty well, directors as well as management require appropriate training. A board that does not have the requisite skills to promote the success of a bank would likely have a very hard time discharging the duty. According to Neema;

> ‘bank geared for success should provide suitable induction training to all new directors, which should include training on their duties, emphasizing those duties under section 143. The training should provide guidance for directors including explanations of directors’ roles, duties and responsibilities, including section 143. Additionally, the company should provide refresher courses from time to time. The training should be tailor made considering the needs of the company and career development appropriate for the directors in order to extend the skills for the benefit

[95] Mambo (n30).

> of the company. The outcome of the training is likely to be enhanced efficiency in achieving the company's goals. [96]

Daudi points out that;

> 'the training sessions should also be a forum where boards are provided with the relevant guidance they need be taking into consideration in order to make appropriate and informed judgments. Such guidance is crucial especially while deciding which judgments to delegate to others in the bank who may be better placed to make them. One of the ways directors can arrive at better judgments is by assessing whether the information they have on stakeholders' interests and relevant to the company's success. Directors cannot know everything and will have to rely on other members of the company where the information required to make the decision is insufficient. However, the boards understanding of its duty to discharge its section 143 duties must be sufficient. [97]

The management should not be left behind in the training. The board of directors gets most of its information from the management, and they use that information to make decisions.

Zawadi notes that;

> There are instances where the director does not know all the relevant facts or have the expertise to make judgments with confidence. This is where the management comes in a properly trained management will know how to present such information to the board. Such information often includes, metrics and reports such as financials, should be broad enough to address the duties under section 143.[98]

Neema observes that;

> 'management should not bombard directors with too much information such that it obscures the things that really matter for the success of the company. The information they require should be customized in a simplified manner from time to time focusing on the priority areas they need to understand to enable them make a sound judgment of the issues. However, directors may need to consider what information is available to others in the company, irrespective of whether it comes to the board.'[99]

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[96] Interview with Neema, Nairobi, Kenya 14 December 2018.

[97] Interview with Daudi, Nairobi, Kenya 29 May 2019.

[98] Interview with Zawadi, Nairobi, Kenya 23 May 2019

[99] Interview with Neema, Nairobi, Kenya 14 December 2018.

While observing that certain judgments are likely to rest with the management below the board, Mambo states that;

> 'Management needs to assess whether the information presented to the directors appears to be supporting the achievement of the company's goals and the board's responsibilities under section 143 in relation to shareholders and stakeholder factors. The board is then required to interrogate the information to ensure that it is aligned with the banks goals.'[100]

3.3.3 Policies and Processes

At the board level, it is important to consider whether and how the board will ensure relevant stakeholder factors, whether specified in section 143 or not, are considered in setting the bank's policies and processes.

A director remains personally responsible for the discharge of own responsibilities, but each director will often rely, to one extent or another, on other directors, in particular on executive directors with allocated responsibilities, as well as on the wider management and team.[101] Neema states that;

> 'The chair will often have a key role in guiding board focus appropriately, recognizing the duties under section 143 in the terms of reference of the board and, if appropriate, each committee. It is important that the company secretary attends all board meetings (and is available generally) to advise directors as necessary on matters relating to their duties and responsibilities under section 143.'[102]

However the board may discharge its duty through approval of policies and processes that have been developed in tandem with the duty. Shani Observes that;

[100] Mambo (n30).

[101] Interview with Neema, Nairobi, Kenya 14 December 2018.

[102] Ibid.

> 'The board needs to ensure implementation of company policies and processes which are relevant to the bank under section 143 topics while allocating responsibility to the appropriate management functions. In so doing, such policies must be consistent, accessible to those they apply to and be easy to understand. The board should consider how the policies have been rolled out and then applied in practice to achieve desired outcomes. In implementation of the bank's policies, there needs to be a balance of prescription and flexibility: some issues may need strict rules, others may to allow exercise of judgment.'[103]

It is important to have policies on engagement with stakeholders. Shani further states that;

> 'In most banks the question of engagement between the company and shareholders, is influenced by what shareholders want, the company's ownership structure and make up, as well as by the company's own judgment. In light of section 143, such engagement will rarely be a matter solely for the board of a company: it will now involve judgment and actions on the part of managers and employees. This is because companies are usually judged by stakeholders on their direct business interactions with those they deal with in the company.'[104]

Accordingly, as the board considers stakeholder engagement, it may wish to consider how stakeholder groups experience the company, its board and management, through those day to day business interactions, as well as through any specific processes, structures or channels established for engagement.[105]

To help in improving the policies and processes, a bank may wish to consider the extent to which engagement feedback both from stakeholders to the company and vice versa is or needs to be fed back to the management, board or into the wider business.[106] Such feedback may be on the form of employee or customer survey responses and complaints and specific board or senior management interactions with smaller groups of stakeholders. The board

[103] Shani (n 93)

[104] Shani (n 93)

[105] Anand (n55).

[106] Keay (n 69).

must therefore consider whether the company does as it says and whether it is perceived by the stakeholders to be doing so.[107]

3.4 Conclusion

Even when a derivative action is permitted to proceed, it is anticipated that breach of s143 will be challenging to prove. Directors seem to have autonomous discretion in performing this duty.[108] It is left to the directors, not the courts, to decide what the interests of stakeholders are as well as the extent to which it is appropriate to consider stakeholders in the promotion of the company thereof.[109] Actions under s.143 are unlikely to succeed unless directors are proved to have failed to exercise good faith. Further, enforcement of any breach is likely to be challenging. It can therefore be deduced that the section lacks effective mechanisms for effective enforcement. With that enforcement gap in mind directors will not have to be too concerned with non-shareholder interests. The problems of the past where directors have often focused on short-term gains may not be remedied after all.

Codification of the duty to promote the success of a company may reduce bank failures.[110] If well trained on their duties, directors will now understand their responsibilities and the sanctions applicable in cases of failure to provide necessary oversight.[111]

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[107] Ibid.

[108] D Fisher, 'The enlightened shareholder – leaving shareholders in the dark: will s172(1) of the Companies Act 2006 make directors consider the impact of their decisions on third parties?' (2009) 20 ICCLR 1 10, 15

[109] J Jay Choi and Sandra Dow (eds), Institutional Approach to Corporate Governance: Business Systems and Beyond (International Finance Review, volume 9), (Emerald 2008) 337- 84, 354.

[110] Fieldwork

[111] Bahati (n5).

CBK and CMA should carry out proper and better vetting and there's improvement needed. The vetting should include lifestyle of the directors.[112] The role of external auditors may need to be relooked at and they should be held accountable.[113] The Board should focus on developing long-term strategies and allocate more time to discuss the same. Regular reviews to track the same are also important. Furthermore the board should be very quick to reach to any changes to the banking environment.[114]

Apart from compliance with corporate governance, other important aspects are crucial for the success of the bank. These include the interest of the employees, motivation, business relationships, impact of company-sustainability, environment, profits, people, reputation and PR, ethical business, fairness, code of conduct for directors.

As much as regulation is important, stringent regulation may at times be a hindrance to a banks success.[115] Success of the company theory needs to be redefined so as to ensure that such success is not achieved at the detriment of the society and other stakeholders. With this observation in mind, this study will now conclude on the findings and make recommendations on how best to ensure success of a bank while complying with regulation in the next chapter.

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[112] Juma (n6).

[113]KPMG in the eye of the stormhttp://e-casoc.blogspot.com/2018/10/kpmg-in-eye-of-storm.html accessed on 20th August 2019.

[114] Juma (n6).

[115] Bahati (n5).

CHAPTER FOUR: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

4.1 Summary of the findings on Enforcement of Directors' Duty to Promote Success of a Company: A Focus on the Banking Sector

1. This study discovered that banks are rightfully subjected to a higher degree of scrutiny than other companies are. . That due to due to the risks inherent in the financial industry, any form of non-compliance affects the entire economy. The banking industry is unlike any other company. Banking is characterized extreme volatility and there is, therefore, a thin line between profitability and failure.[1]

2. The board of directors does play a critical role in determining whether the bank will fail or succeed. The board of directors is charged with the responsibility of steering the bank in a certain direction and if this is not properly done the bank may fail. Hence the success or failure of a bank is hugely dependent on the board and the constitution of the board.[2]

3. The study also found that the Board can be used to influence a banks market credibility. That that it matters who sits on the board. If a board member is one with a tainted character, stakeholders will not be confident dialing with such a bank and the banks success will definitely be affected.[3]

4. This study noted the ambiguity in the way the duty to promote the success of the company is codified. This affects the enforcement of the duty and the study sought to

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[1] See discussions in chapter 2.

[2] See discussions in chapter 2.

[3] See discussions in chapter 2 and 3.

find clarity in the words used to describe the duty. The study found clarity in the description of the terms “good faith”, “interest of the company vs. interest of stakeholders” and “success”.[4]

5. The study also found that even when the law is clarified, some banks still have challenges in attaining success. Among the reasons identified for such failure include; rigidity, poor investment decisions, banks runs and the ripple effect and finally and most important, non-compliance with corporate governance guidelines.[5]
6. There is a connection between best practices of corporate governance and organizational performance. That a bank that embraces good corporate governance practices is likely to succeed.[6]
7. The law has been lenient on directors of failed banks, mostly because of the challenges in enforcement of the law. As much as the Companies Act has introduced reforms, there are glaring gaps to enforcement. As much as the act has introduced fines and sanctions against the directors of failed companies, proving the director’s liability remains a huge challenge.[7]
8. In the course of the study, during the fieldwork, it was discovered that a large number of bank directors rarely allocate sufficient time towards the company’s strategy and governance matters. The respondents observed that some directors sitting in the boards do not even have an idea on what the strategy if the bank is. This study therefore

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[4] See discussions in chapter 3.

[5] See discussions under chapter 2.

[6] See discussions under chapter 2.

[7] See discussions under chapter 3 and sections

observed that perhaps allocating more time to their role as directors would reduce instances of banks struggling to keep afloat.[8]

9. A director's qualifications play a significant role in determining the success or failure of a bank. That as much as the board should be made up of directors with diverse backgrounds, a good percentage should have experience in banking. Given the distinct nature of the banking industry, bank directors should have the requisite expertise, in order to add value to the decision making process of the bank.[9]
10. The study found that regulation is good for the banks. However, if not checked and not done in consultation with the stakeholders in the banking sector, the stringent regulation can drive banks out of business or make it difficult for them to thrive. Banks should be regulated but not over regulated.[10]
11. Codification of the duty to promote the success of a bank is a step in the right direction. It brings about a degree of clarity when it comes to the duty. However, the study found that the stumbling block lies in interpretation and enforcement of the duty. The duty as codified has elements of subjectivity thus creating uncertainty. Furthermore the duty was transplanted from the UK without considering Kenya's local environment.[11]
12. The fieldwork revealed that the board is often reviewed as a whole and no particular format is used for board assessments. Further the stakeholders, especially, never get to find out the results of the assessments. As such the board assessment usually has no

[8] See discussions under chapter 2.

[9] See discussions under chapter 2.

[10] See discussions under conclusion in chapter 2.

[11] See discussions under chapter 3. See also Section 172 of the UK Companies Act of 2006.

bearing on the reappointment or discontinuation of a director from the board. Often the shareholders will re-elect the board as a whole without scrutinizing any particular director. The respondents observed that individual reviews of directors should be carried out against the performance of the bank. That this can be achieved through scorecards and periodic appraisals against certain set standards in line with corporate governance standards.[12]

13. The study also found that minority shareholders are not sufficiently empowered to bring action on behalf of the company. As much as the Companies Act provides for derivative actions, the barriers to succeeding in institution and prosecution of a derivative action are overwhelming and discouraging.[13]

4.2 Introduction

This study was inspired by the failure of banks in the wake of the enactment of the Companies' Act. this was despite the duties of directors, particularly the duty to ensure the success of the company being clearly codified. Such failure has often been attributable to weak regulatory frameworks and poor governance practices. This study therefore sought to research into the duty to ensure the success of a company with a focus on the banking industry. The focus was whether the duty as codified was enforceable and adequate to hold directors if failed banks responsible, especially now that the Companies Act provides for derivative actions. This study is cognizant of the strides that the law has taken in ensuring compliance of corporate governance practices, but is not certain that the measures are adequate as presently codified.

[12] See discussions under chapter 2.

[13] See discussions under chapter 3 and sections

This study carried out interviews with respondents who are either directors of banks or stakeholders in one way or another. This was to understand whether the bank directors were aware of the critical nature of their role by the fact that they are directors in a bank. I also sought to understand whether the respondents were aware of the duty to promote the success of the bank and what they understood it to mean.

In the course of my research I identified some gaps in the law that hinder the enforcement of the duty. This study has therefore highlighted them and my interaction with the enforcement officers at CBK and at the judiciary helped shed light on the obstacles and ways in which they can be overcome.

In the end this study was able to establish the nexus between good corporate governance practices in a bank and the success of a bank. That having a law and depending on enforcement officials is not sufficient. The internal governance is paramount to the success of any bank.

4.3 Testing of the Hypotheses and Presumptions

This study was based on three hypotheses being;

1. When directors of banks appreciate the critical nature of their role and perform their duties well, the bank is likely to succeed.

2. The more a bank ensures compliance with good corporate governance practices the more successful it will be.

3. The inherent weaknesses in the duty to promote the success of the bank as codified will often impede the enforcement of the duty.

The first hypothesis was tested in chapter two of this study. The main variables in the hypothesis are the “appreciation of the critical nature of the role” and “success of the bank”.

The interrelation between the variables is that the role of a director of a bank is unlike the role of a director in any other company. This is due to the position that banks hold in the country's economy and their interaction with public funds. The banking industry is therefore highly regulated. In this regard, directors in a bank have a bigger responsibility that they need to appreciate and discharge effectively to ensure the success of the bank. This hypothesis has been proven by the study in that indeed bank directors play a critical role in the success of a bank particularly when they appreciate the exceptional nature of their role.

The second hypothesis was also tested in chapter two of this study. The main variables in this hypothesis are "compliance" and "success". The field and desktop research of this study established that the banks that are often successful, are those that comply with the law and corporate governance practices.

The third hypothesis was tested in chapter three of this study. The main variables of the hypothesis are "the weaknesses in the law" and "enforcement". The interrelation between them being that the inherent weaknesses in the law concerning the duty to ensure the success of a bank, are likely to affect the enforcement of the duty. This hypothesis has been proven since there are indeed inherent challenges in the law and these challenges have made it difficult to enforce the duty. These paper therefore recommends ways in which these challenges can be overcome.

4.4 Conclusion

This study sought to research whether the director's duty to promote the success of a company as codified is adequate in holding bank directors responsible for failure of banks. Noting that any breach of the duty highly relies on enforcement through the Courts the

study also sought to find out whether there are adequate mechanisms in the banking industry to ensure directors discharge their duties appropriately.

This study has addressed the research problem and concludes that it is very unlikely that the ESV principles in section 143 of the Companies Act will bring about substantive change in the management of Kenyan banks. Although it might is still too early to tell, the view that seems to dominate is that nothing much will change as far as actions under s.143 are concerned.[14] While the section has only been in force for almost four years, one would expect significant strides have been made and that we should have seen a good number cases that have addressed the duty. The failure to develop significant case law on the duty could be due to a number of reasons. First, the wording of the duty creates ambiguity. As a result, lawyers exercise caution and are often reluctant to institute proceedings on behalf against directors for breach on behalf of their clients, due to the uncertain nature in the meaning of the provision and its effect. Second, directors are might simply be taking advantage of the legal and enforcement loopholes and not 'breaching' the section per se, or at least noticeably. It is also possible that directors have been advised by their lawyers to take conservative action. Some companies have been concerned about the changes brought about by the introduction of s.143 and therefore may have sought legal counsel on running their affairs without breaching the law.[15] Third, litigants may be relying on other breaches, other than breach of section 143, as the basis for actions against directors.

[14] Fieldwork findings.

[15] J. Loughrey, A.Keay and L. Cerioni, ' Enlightened Shareholder Value and the Shaping of Corporate Governance' (2008) 8 Journal of Corporate Law Studies 79.

It is debatable whether s.143 changes things much, or at all. This study concludes that bank failures can be to an important extent attributed to failures and weaknesses in corporate governance arrangements. The development and refinement of corporate governance standards often follows the occurrence of corporate governance failures that have led to the collapse of bank. In the Enron case, corporate governance shortcomings may not have caused the failure in the strict sense. Rather, the shortcomings facilitated as they lacked mechanisms of preventing the practices that resulted in the failure.[16]

4.5 Recommendations

It is important to consider the utility of section 143 within the context of a broader corporate governance reform in the banking sector. In light of that this study makes the recommendations below.

4.5.1 Balance between overregulation and promoting the success of a bank

Stringent regulation of banks, while protecting the consumers, may end up creating barriers to innovation in banking in the end banks will not come up with better products for their consumers. As a result, their profits will dwindle and the bank may end up in a loss position. This study is not against total regulation, but advocates for regulation that is up-to-date with the constantly changing banking environment. Banking is a highly technological industry that needs constant innovation to thrive. However due to the over-regulation with some of the regulations being counterproductive or outdated, banks have very little incentive to transform with the consumer needs.

[16] Grant Kirkpatrick, 'The Corporate Governance lessons from the financial crisis' (2009) Financial Market Trends vol.2009/1. Paris: OECD.

4.5.2 Definition of Long-termism

From the discussions in chapter 3, this study has established that long termism means to make the present decisions for long-term benefit of the bank. However, what it entails is still unclear and this study proposes the following:

1. Having long-term plans and communicating the progress to the stakeholders on quarterly basis. In Kenya the quarterly reports are mainly about the profit or loss positions of the bank and not necessarily on the strategy.[17]

2. Fostering of long-term relationships with the stakeholders. This may be achieved through creation of communication channels with the stakeholders, and listening to what they have to say about the bank. This helps to keep the bank in check, especially, considering that it is a consumer centric industry. When aligned with long-term strategy, such communication lines can enable the bank to achieve its long-term goals.

3. Alignment of the banks policies along its long-term goals and to monitor compliance.

4. Reward long-termism and tying the directors pay to achievement of certain milestones within the banks long-term strategy. Rewarding short term goals will see the directors' priorities changing towards achieving the short term goals as opposed to the success of the bank.

[17] Kilinda (n 90).

4.5.3 Localization of laws to the Kenyan environment

There is need for Kenya to come up with laws governing the Kenyan banks taking into account their specific banking environment and structures. This may be done through subsidiary legislation requiring all banks to report, explaining how their directors comply with section 143.[18] Corporate reporting should exist for a purpose and it is important to acknowledge that multiple audiences in addition to investors will be interested in the information provided.

The implementation of these principles should be commensurate with the size, complexity, structure, economic significance, risk profile and business model of the bank and the group (if any) to which it belongs. This means making reasonable adjustments where appropriate for banks with lower risk profiles, and being alert to the higher risks that may accompany more complex and publicly listed institutions.[19] Lord denning and the bill

4.5.4 Enhancement of minority shareholders right to bring a suit on behalf of the company

A company is a person.[20] As such, only the company has the right to institute proceedings to remedy such wrong.[21] However, a company has no mind or soul and therefore cannot make decisions of its own. For this reason, its directors act and make decisions on its

[18] Zuri (n1).

[19] Basel Committee on Banking Supervision n (61).

[20] Salomon v Salomon & Company Limited[1897] AC 22.

[21] Foss v Harbottle (1843) 2 Hare 461.

behalf.[22] Instances arise when the directors actions are themselves the cause of action and the company is therefore incapable or reluctant to institute a suit to enforce its rights. Despite provisions on derivative actions in the Kenyan Companies Act, it is proving, compliance with the requirements of instituting a derivative action can be, cumbersome. As such there may be no one able, or even willing, to commence the actual proceedings.

It may be asserted that since both present and future members can potentially instigate a derivative claim[23] stakeholders could simply buy shares. Despite this possibility, the required consideration of whether the claimant is acting in good faith should filter out any vexatious claims.[24] The procedural requirements generally are a further restraint on activist groups purchasing shares and claiming their 'pet' interest has not been rightfully considered.[25] Fundamentally, it is also believed that members who have purchased shares purely to bring derivative claims will be met by a hostile judiciary. It is, therefore, unlikely that the courts will allow derivative action to become a vehicle for activists.

There are some glaring gaps in enforcement of the duty especially when it comes to derivative actions. This study proposes that collaborative efforts between shareholders and directors should be reinforced and the law amended to make it easier for institution of derivative actions.[26]

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[22] In *Lennard's Carrying Company –Versus- Asiatic Petroleum Company Limited* (1915) AC 705 at 713, it was observed that a corporation being an abstraction, has no mind of its own any more than it has a body of its own.

[23] Section 238(5), Companies Act, Laws of Kenya.

[24] Section 239, Companies Act, Laws of Kenya.

[25] Rachel C. Tate (n 47).

[26] Bahati (n5).

4.5.5 Mandatory compliance (legal audits).

Corporate governance codes are considered a form of soft law. This is because they comprise a set of voluntary best governance practices. Banks, like other companies follow a comply or explain rule hereby they explain the extent to which they complied with the governance codes and explain any deviations. Recently, countries are moving towards mandating the essential corporate governance provisions. In Kenya the companies act has done so but the mandatory nature of the codification should be clear. This needs to be brought out clearly.

4.5.6 Better diversification of boards

Non-executive directors may often not be privy to knowledge and information that will empower them to determine whether some action and decisions will promote the success of the company. This has been a challenge for most boards for a while. Being a unique industry, there are indications that some of the challenges facing the banking industry at board level require experience. In other words, the board of a bank should be comprised of some directors that have the requisite expertise and comprehension of the banking industry.

Roman Tomasic, in his study of Northern Rock, said that:

> ―the qualifications of the former chairman of Northern Rock, Dr. Matt Ridley, did not escape comment in the media when it was noted in the Financial Times that he was a zoologist and a successful science writer. He had joined the board of Northern Rock in 1994 and then served as non-executive chairman from 2004 until 2007; he resigned after being criticised

in Parliament for harming the reputation of British banking and for lacking financial experience.[27]

The board must be proper to discharge its responsibilities and have a structure that facilitates effective oversight. For that purpose, the board should be comprised of a sufficient number of independent directors. The board should be comprised of individuals with a balance of skills, diversity and expertise, who collectively possess the necessary qualifications commensurate with the size, complexity and risk profile of the bank.[28]

Appointment of directors who are capable to make a positive influence is one of the key elements of board effectiveness.[29] From the research, it is clear that the most diverse boards are the best. They offer extensive insight that the non-diverse boards simply cannot. The diversity should go beyond age, ethnicity, gender, skills and competencies to philosophies and life experiences.[30]

Board candidates should not have any conflicts of interest that may impede their ability to perform their duties independently and objectively and subject them to undue influence.[31]

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[27] Roman Tomasic, 'Corporate Rescue, Governance and Risk Taking - Northern Rock and Its International Context' (2009) The company lawyer, 330,334.

[28] Basel Committee on Banking Supervision, 'Guidelines, Corporate governance principles for banks' 2015 < https://www.bis.org/publ/bcbs294.pdf> accessed on 4 April 2019.

[29] International Finance Corporation, 'From Companies to Markets - Global Developments in Corporate Governance' (2016) <https://www.ifc.org/wps/wcm/connect/5a764bef-bd5f-4b52-9d34-2eabde03e6f0/From-Companies-to-Markets%E2%80%94Global-Developments-in-Corporate-Governance-April-2016.pdf?MOD=AJPERES&CVID=liCJzzq> accessed on 3 February 2019.

[30] Ibid.

[31] Basel Committee on Banking Supervision (n28).

4.5.7 The board should dedicate sufficient time to their mandate and keep abreast of developments in banking.

Studies have indicated that an effective board now spends more time in deliberations than it did previously.[32] According to a McKinsey study conducted in 2016, high impact boards and directors invest more time, particularly on strategy, performance management, organizational health and risk management that prior to the financial crisis.[33]

The board should actively engage in the affairs of the bank and keep up with material changes in the bank's business and the external environment as well as act in a timely manner to protect the long-term interests of the bank. It should have a wholesome view of the company.

The success of the bank largely depends on its strategy and its ability to innovate in accordance with the needs of the community. Banking is highly technologically volatile industry and failure to adopt disruptive technologies that improve customer experience may differentiate the banks.[34] The boards of banks that succeed are able to strategically lead the banks and take advantage of available opportunities.[35] As in any sector of the economy, the failure of a bank is an indication of one or the other of the following: either the firm

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[32] Mckinsey & Company, 'The Board Perspective: A collection of McKinsey insights focusing on boards of directors' August 2016, < https://www.mckinsey.com/~/media/mckinsey/featured%20insights/leadership/the%20board%20perspective/the-board-perspective.ashx> accessed on 4 April 2019.

[33] Mckinsey & Company, 'The Board Perspective: A collection of McKinsey insights focusing on boards of directors' August 2016, < https://www.mckinsey.com/~/media/mckinsey/featured%20insights/leadership/the%20board%20perspective/the-board-perspective.ashx> accessed on 4 April 2019.

[34] Bahati (n5).

[35] Ibid.

has not reacted to market demands with the relation to the competitors or the product the bank is offering is not in adequate demand by customers to warrant its production in the first place.[36]

Consumers of banking products, particularly the youth, are now turning to digital services and tools for their financial needs, increasingly making the traditional banks susceptible to failure. Banks are well aware of this competition and have invested heavily in innovation through going digital, simplicity processes and advanced pricing models.

The emergence of new digital money transfers systems which mainly use mobile phones, has significantly changed banking services in Kenya. Mobile money transfer in Kenya has overtaken all electronic and card money transfers combined, in terms of the number of customers and the overall transactions value.[37] Moreover, mobile money transfer platforms are being utilized in every aspect of human life. These utility aspects include, mobile transfer of money to deposit accounts held with commercial banks and withdrawing cash from bank accounts.[38]

4.5.8 Individual Director Evaluations

The quality of a board of directors is an important factor for stakeholders such as investors while making investment decisions. These stakeholders require information on individual

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[36] Dale Tussing, 'The Case For Bank Failure', 10 J.L. & Econ. (1967)129, 143

[37] CBK, 2015, 'Payment Systems Statistics' https://www.centralbank.go.ke/index.php/nps-modernization/mobile-payments accessed on 26 July 2019

[38] Chimwemwe Chipeta and Moses Muthinja, 'Financial innovations and bank performance in Kenya: Evidence from branchless banking models', 2018 South African Journal of Economic and Management Sciences 21(1), a1681 https://doi.org/10.4102/ sajems.v21i1.1681 accessed on 20th April 2019.

directors' track records and their individual contributions to the board.[39] They would also be interested to know where they stand on crucial boardroom issues, as well as the outcomes of the board assessments.

According to the Agency theory, each director is an agent on an individual capacity. Addressing such individual director liability can go a long way in reducing breaches of the duty by the directors. Board evaluations should be carried out regularly to appraise the directors' performance and assess whether they possess the correct mix of skills and competencies. Aspects of attendance of board and committee meetings should form part of the parameters of evaluation. To support its own performance, the board should carry out regular assessments – alone or with the assistance of external experts – of the board as a whole, its committees and individual board members.[40]

Individual director evaluations are an important complement to the evaluation of a board's overall performance. The evaluations should ideally form the basis for renewal of appointment or removal of directors from the board. Since each director brings a different set of competencies to the board, it can be difficult to establish criteria for assessing them. To be safe the evaluation should be in line with the key aspects outlined by Section 143 of the Kenyan Companies Act.

Board assessment can be a waste of time if not properly conducted and documented. During these board evaluations the company secretary plays a critical role in guiding the board on

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[39] Jay Conger, Edward Lawler III, Edward Lawler III, 'Evaluating The Directors: The Next Step in Boardroom Effectiveness' <https://iveybusinessjournal.com/publication/evaluating-the-directors-the-next-step-in-boardroom-effectiveness/> accessed on 24 October 2019.

[40] Interview with Neema, Nairobi, Kenya 14 December 2018

the best practice. Directors and CEOs are likely hesitant to evaluate high-profile board members. There is also a likelihood of possible conflict and straining working relationships. Furthermore, individual reviews may influence director to tend towards optimizing their individual performance rather than contribute to the team's effectiveness. While individual appraisal is critical the key focus in appraisals should be on the performance of the board at the collective level rather than the individual level. These maybe achieved by creating a tool that captures the individual directors' contribution to the company's objectives.

4.5.9 Balance between Shareholder and Stakeholder

Corporations do not operate in a vacuum. The main guiding principle is that there should be a dialogue with stakeholders based on the mutual understanding of objectives. The board as a whole, has responsibility for ensuring that a satisfactory dialogue with stakeholders has taken place during the board's decision-making process.[41] This duty creates a culture where the company considers the wider impact of its decisions.

Section 143 applies across directors' roles. In larger companies, many more decisions are taken by management and employees in the context of strategies and policies which have been set by the board. While directors may not be involved in those individual decisions, they should ensure those strategies and policies have been set by the board in accordance with section 143.

[41] Interview with Mambo Nairobi, Kenya 19th June 2019.

A fundamental component of good governance is a corporate culture of reinforcing appropriate norms for responsible and ethical behaviour. These norms are especially critical in terms of a bank's risk awareness, risk-taking behaviour and risk management.[42]

4.1 Closing statement

This study has considered the director's duty to promote the company, the ambiguity in the duty and enforcement challenges. It has identified the gaps in interpretation and enforcement of the duty and made appropriate recommendations on how bank directors can steer the company in the right direction, within the existing legal framework.

Although the duty to promote the success of the company has been in force for a short time, with the guidance contained in this thesis, the duty will surely attain its intended purpose. There is however need to carry out more research on how the independence enforcement agents can be enhanced.

Should the recommendations contained in this theses be disregarded, then we shall end up with a law that only exists in statute, and this study would not have served the intended purpose. 'Without enforcement, the law will not be a law, but just a norm.'[43]

[42] Interview with Shani, Nairobi, Kenya 18 June 2019

[43] Interview with Busara, Nairobi, Kenya 10 June 2019.

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APPENDIX I: WORK PLAN

ACTIVITIES	OCT. 2018	NOV. 2018	DEC. 2018	JAN. 2019	FEB. 2019	MARCH 2019	APRIL 2019	MAY 2019	JUNE 2019	JULY 2019	AUG 2019	SEPT 2019	OCT. 2019
Presentation of amended proposal													
Field work (Data Collection)													
Data Coding ,Tabulation and Analysis													

Chapter 1													
Chapter 2													
Chapter 3													
Chapter 4													
Submission & Defense													

APPENDIX II: PERMIT FROM NACOSTI

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

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Ref. No. **NACOSTI/P/18/32197/26013**

Date: **30th October, 2018**

Eunice Wangari Kamau
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on "***Enforcement of director's duties in the banking sector***" I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for the period ending **29th October, 2019.**

You are advised to report to **the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit **a copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.

BONIFACE WANYAMA
FOR: DIRECTOR-GENERAL/CEO

Copy to:

The County Commissioner
Nairobi County.

The County Director of Education
Nairobi County.

APPENDIX III: RESEARCH QUESTIONNAIRE

Study Title : Enforcement of Directors' Duty to Promote Success of the Company in the Banking Sector

Researcher: Eunice W Kamau

Tel no: 0723353948

Email: wangari.eunicek@gmail.com

Supervisor: Prof. Edwin Abuya

INTRODUCTION

Dear Sir/Madam,

Thank you for accepting to participate in this interview. I am a postgraduate student at the University of Nairobi pursuing a Master degree in Law. In partial fulfillment of my master degree, I am conducting a study on *Enforcement of Directors' Duty to Promote Success of the Company in the Banking Sector.*

This questionnaire is administered as part of my study in assessing the directors' duty to promote the success of a company within the banking industry; whether statutes are sufficient to ensure success of the company; and establish whether there is a need to enhance enforcement of the duty.

Please note that any information you give will be treated with utmost confidentiality and at no instance will it be used for any other purpose other than for this project. Your identity will be concealed. Your response will be recorded in the questionnaire.

The interview is intended to take approximately 30 minutes. If you have any questions

please feel free to contact me.

Do you agree to participate in the study? Yes ……………… No…………………..

Kindly sign here:__________

SECTION A: BIO DATA

1. Gender : Male ☐ Female ☐

2. Occupation…………………………………………………………

3. What is the highest degree or level of school you have completed? If currently enrolled, please indicate ………………..

SECTION B: THE DUTY TO PROMOTE SUCCESS OF THE BANK

1. Do you think banks are subjected to a higher degree of scrutiny than other companies? If so,Why?
2. Do you think the board of directors plays a critical role in the success of a bank?
3. Briefly what you understand by a bank director's duty to ensure success of the company.
4. What in your opinion might be the tell-tale signs that a bank is on its path to success?
5. Which are the ways in which the board of directors can be used to influence a bank's market credibility?

SECTION C: SUCCESS OF A BANK AND CORPORATE GOVERNANCE

6. Is there a connection between best practices of corporate governance and organizational performance? Explain

7. Has the law been lenient on directors of failed banks?

8. Why is it that some banks succeed and others fail yet they operate in the same environment?

9. A director is required under the law to act in a way that he considers, in good faith, would promote the success of a company. How would you define good faith in this context?

10. Do you think directors of banks allocate sufficient time towards the company's strategy and governance matters?

    Do they add any meaningful value to the strategy of the company?

11. Do you think good governance and the success of a bank is pegged on the director's qualifications?
12. Does stringent regulation directly translate to the success of a bank?

    If not, why?

SECTION C: ENFORCEMENT

13. Has codification of the duty to promote the success of the company helped to reduce bank failure?

14. Is the Kenyan banking environment unique in any way from other countries and does this affect how the duty to promote success of a bank can be enforced?

15. Do you think the performance of directors should be reviewed individually against the success of the bank?

    If so, which are the ways that this can be done?

16. Do you think that too much pressure on directors in their performance of their duty to promote the success of a bank can negatively affect their performance?
17. Do you think minority shareholders are sufficiently empowered to bring a suit on behalf of the company if it is in the best interest of the company. If not, should this be enhanced?
18. Suggest possible ways in which enforcement of the duty to promote the success of a company can be achieved.

APPENDIX IV: SCHEDULE OF INTERVIEWS					
NUMBER OF PARTICIPANTS	**PSEUDONYMS**	**SEX**	**PLACE OF INTERVIEW**	**OCCUPATION OF THE PARTICIPANT.**	**DATE OF THE INTERVIEW**
1.	Neema	F	Nairobi	Company Secretary at a Bank	14/12/2018
2.	Juma	M	Nairobi	Enforcement Officer - Central Bank of Kenya	25/01/2019
3.	Taji	M	Nairobi	Lecturer and Scholar	29/01/2019
4.	Mwanaidi	F	Nairobi	Compliance Agent - Capital Markets Authority	13/02/2019
5.	Bahati	M	Nairobi	Compliance Agent - Capital	25/02/2019

				Markets Authority	
6.	Asha	F	Nairobi	Compliance/AML Manager at a Bank	27/02/2019
7.	Shaka	M	Nairobi	Banker- Credit Analyst	01/03/2019
8.	Zola	F	Nairobi	Director at a Bank	01/03/2019
9.	Hassan	M	Nairobi	Legal Manager at a Bank	12/03/2019
10.	Tambo	M	Nairobi	Head of Compliance at a Bank	18/03/2019
11.	Jamila	F	Nairobi	University Lecturer	26/04/2019
12.	Omar	M	Nairobi	University Lecturer	30/04/ 2019
13.	Zawadi	F	Nairobi	Advocate	23/05/2019
14.	Daudi	M	Nairobi	Advocate	29/05/2019
15.	Busara	F	Nairobi	High Court	10/06/2019

				Judge	
16.	Zuri	F	Nairobi	Magistrate	12/06/2019
17.	Kilinda	F	Nairobi	Legal Manager at a Bank	18/06/2019
18.	Shani	F	Nairobi	Risk and Compliance Manager at a Bank	18/06/2019
19.	Mambo	M	Nairobi	Director at a Bank	18/06/2019